**PP**

**v.**

**DATO' SERI ANWAR IBRAHIM & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
ARIFIN JAKA J
[CRIMINAL TRIAL NOS: 45-51-98 & 45-26-99]
30 APRIL 2001

***CRIMINAL LAW:*** *Penal Code - Section 377B - Carnal intercourse against the order of nature - Proof of*

***CRIMINAL PROCEDURE:*** *Charge - Framing of - Amendment of - Whether charges vague and weak - Section 153(i) Criminal Procedure Code - Whether charges false and fabricated - Amendment of charges - Whether mala fide and an abuse of process - Ingredients of charges to be proved*

***CRIMINAL PROCEDURE:*** *Defence - Alibi - Section 402A(1) Criminal Procedure Code - Whether fresh notice required subsequent to amendment of charges*

***CRIMINAL PROCEDURE:*** *Defence - Conspiracy - Conspiracy to fabricate evidence*

***CRIMINAL PROCEDURE:*** *Sentence - Mitigation - Aggravating factors*

***EVIDENCE:*** *Confession - Admissibility - Voluntariness - Sections 24 and 26 Evidence Act 1950 - Confession used against co-accused - Whether confession to magistrate admissible - Section 115 Criminal Procedure Code - Oral testimony - Whether runs foul of ss. 91 and 92 Evidence Act 1950 - Voir dire*

***EVIDENCE:*** *Witness - Credibility of - Whether victim or accomplice - Contradictory statements at earlier trial - Whether reasonable explanation provided*

***EVIDENCE:*** *Witness - Recalling of - Syariah Court conviction - Whether evidence summoned essential to just decision of case - Effect on credibility of witness*

***EVIDENCE:*** *Impeachment - Effect of - Material contradictions in statements in earlier corruption trial and instant trial - Whether discrepancies clearly explained*

***EVIDENCE:*** *Corroboration - Sexual offence - Whether necessary - Corroboration by conduct of the accused*

***EVIDENCE:*** *Expert evidence - Probative value of - Examination of victim to determine whether sodomy occurred - Professional privilege*

This was the joint trial of both the accused who had been charged separately for offences under the Penal Code. The accused in Criminal Trial No. 45-51-98, Dato' Seri Anwar Ibrahim ('A1'), was charged with the offence of committing carnal intercourse against the order of nature on one Azizan Abu Bakar ('Azizan') at Unit No. 10-7-2, Tivoli Villa, Bangsar at around 7.45pm sometime between January and March 1993. The accused in Criminal Trial No. 45-26-99, Sukma Darmawan Sasmitaat ('A2'), was charged with the aforesaid offence and also with the abetment of the same. The charges were amended twice prior to the commencement of the trial.

The prosecution's case revolved around the testimony of their principal witness, Azizan, and to corroborate Azizan's evidence, they sought admittance of A2's confession to a magistrate on 17 September 1998. This was strenuously objected to by the defence on the grounds of procedural non-compliance and that the confession was involuntarily made. A *voire dire* was conducted to resolve the issue.

The defence was anchored on the following grounds:

(a) The charges were weak, vague and a mere fabrication with the common design and intent to embarrass A1 and destroy his political career. The frequent amendments to the charges were *mala fide* and an abuse of process;

(b) Azizan was neither a truthful nor a credible witness – this was evidenced by the inconsistent statements he made at the instant trial and whilst testifying at the earlier corruption trial, and the confusing and contradictory statements he made pertaining to the date the alleged offences purportedly took place;

Furthermore, his subsequent arrest and conviction for *khalwat* (close proximity) and attempting to commit *zina* (adultery) reflected adversely on his claim of being a religious person with high morals and irretrievably destroyed his credibility;

(c) A2's confession was wrongfully and illegally procured and the voluntariness of the same was in question; and

(d) The offence could not have been committed as alleged because at that material time the apartment in question was under renovation and A2 only assumed occupancy of the same sometime in April 1993.

Furthermore, for the period from 4 February 1993 to 31 March 1993 A1 was away on official engagements and could invoke the defence of alibi.

Additionally, the court was also faced with the following issues: (i) whether a fresh notice of alibi was forthcoming in view of the amendments made to the charges; (ii) whether A2's confession could be used against A1 as it was the confession of a co-accused; and (iii) whether there was a need for Azizan's testimony to be corroborated.

**Held:**

**[1]** The Criminal Procedure Code requires that the particulars in a charge must and should be adequate to give the accused reasonably sufficient notice of the offence he is alleged to have committed. From time immemorial the date specified in an indictment has never been of material importance save in situations where it is actually an essential component of the alleged offence. The charges in this instance were clear, unambiguous and clothed with clarity and certainty – both the accused were neither misled nor prejudiced by the charges as framed and the omission of the exact date had not occasioned a miscarriage of justice. The submission advanced by the defence that the charges were vague and lacked certainty was thus without merit.

**[2]** The Penal Code accords the Attorney General, who is also the Public Prosecutor, a very wide discretion in all criminal prosecutions save proceedings before a Syariah Court, a Native Court or a Court Martial. It was thus well within the rights and powers of the prosecution to amend the charges as it saw fit and no reason need be given for doing so. The defence had neglected and/or failed to adduce relevant evidence to substantiate their contention that the amendments were *mala fide* and that the charges were false and fabricated.

**[3a]** The High Court had the jurisdiction to determine the admissibility of A2's confession to the magistrate on whom s. 115 of the Criminal Procedure Code imposed a duty to record, which in this instance the magistrate did. Hence, the contention by the defence that the confession was not recorded in full was without merit.

**[3b]** The magistrate had not violated the procedural requirements of s. 115 of the Criminal Procedure Code in failing to ascertain A2's place of detention prior to recording the confession and subsequently forwarding a copy of the same to ASP Rodwan. The magistrate was seen to have made genuine and concerted efforts to ascertain the voluntariness of the same by asking pertinent questions and conducting a physical examination to ensure that A2 suffered no injuries. The magistrate had forewarned A2 of the probable use of his confession against him in a trial. It is not a requirement under the law to number and initial all pages of a confession but merely a matter of practice and prudence. There was no evidence that the confession had been tampered with – the confession represented the true and actual record of what transpired between the magistrate and A2.

**[4]** The prosecution had tendered relevant evidence to prove beyond a reasonable doubt that A2's confession had been made voluntarily with due compliance of the law. There were no elements of oppression, promise, threat, inducement or the use of other unlawful means that would warrant the exclusion of the confession. It could thus be admitted in evidence to corroborate Azizan's story.

**[5a]** The record of proceedings revealed material contradictions in the statements made by Azizan in the earlier corruption trial in relation to those made in the instant trial. The earlier statement that he was not sodomised after September 1992 was clarified by him to mean that he was not sodomised at A1's residence but elsewhere after September 1992. He staunchly stood by his second statement that he was sodomised at Tivoli Villa between January and March 1993 and emphatically denied that SAC1 Musa had compelled him to say as such. SAC1 Musa's testimony concurred with Azizan's consistency as to the issue of sodomy – it was the precise dates he was unsure of.

**[5b]** Azizan's conviction in the Syariah Court was irrelevant and of no consequence insofar as the assessment of his credibility was concerned.

**[5c]** The mere fact that impeachment proceedings were allowed to be instituted against Azizan did not automatically disqualify him as a truthful and credible witness. Upon close scrutiny, Azizan's explanation was logical and not inherently incredible bearing in mind the questions posed to him. Any purported contradictions had been successfully explained and there was no difficulty in accepting it

under the circumstances and on the available evidence. The impeachment proceedings failed and Azizan's credibility as a truthful and reliable witness remained intact.

**[6a]** The general rule is that in a sexual offence case, corroboration of the victim's evidence is desirable though not technically essential, and the court should and must accord due consideration to the matter. A conviction founded on the uncorroborated evidence of the victim is not illegal provided the presiding judge duly warns himself of the danger of convicting on such uncorroborated evidence.

**[6b]** Azizan had been requested by A1 to deny the statutory declaration containing allegations of sodomy against A1. SAC1 Musa was asked to cease and desist investigations into the same. The testimonies of Azizan and SAC1 Musa were neither challenged nor refuted and the court construed this as acceptance of the testimonies. The court viewed A1's conduct as tantamount to procuring false evidence and attempting to destroy evidence. Consequently, A1's conduct was found to be relevant and admissible to the extent that it enhanced Azizan's credibility and corroborated his evidence.

**[7]** The defence of alibi is a legitimate defence and more often than not is the only defence of an innocent man. A1 successfully established an alibi for the period covering 4 February to 31 March 1993 but woefully no evidence of alibi was available for the period 1 January to 3 February 1993. A2 did not adduce any evidence in support of his alibi for the period 1 January to 31 March 1993. Consequently, the defence of alibi had failed to raise a reasonable doubt as to the guilt of both the accused or the truth of the prosecution's case.

**[8]** A1's bare denial of his visit to Tivoli Villa as per the charge had to be rejected in the face of the overwhelming and convincing evidence of Azizan and A2.

**[9]** A2 contended that the charges against him were unsustainable as he was not in occupation of the apartment at the material time the offence was alleged to have been committed as the same was in the midst of renovations. The court found this argument untenable as the renovations were confined to the bathroom attached to the master bedroom which left the other rooms free for use. Furthermore, prior to occupation, A2 was in possession of the keys to the apartment which accorded him restricted access to the same at all material times.

**[10]** A2 further pleaded impossibility as there was no bed or mattress on which to commit the offence as the same was only purchased and delivered on 11 February 1993. The authenticity of the receipt evidencing the same was suspect and the court treated the supervisor's evidence with suspicion and caution – Azizan's evidence was preferred.

**[11]** The court can convict an accused based solely on a confession by his co-accused provided always the confession reveals sufficient evidence to satisfy the court beyond a reasonable doubt as to the accused's guilt. In the instant case A2's confession could be utilised as it was capable of standing on its own.

**[12]** The court did not attach any probative value to the evidence of the expert witnesses Dr Zahari Noor and Dr Abel Arumugam that their physical examination of A2 did not reveal signs of sodomy as it did not conclusively prove whether A2 was or was not sodomised and did not aid the court in determining the truth of the confession.

**[13]** Upon close scrutiny and review of the evidence tendered through the witnesses called on A1's behalf, the court was satisfied that the defence of conspiracy to fabricate evidence against A1 was not substantiated and therefore failed.

**[14]** The prosecution had successfully made out all the ingredients of the offence and established a case beyond reasonable doubt. The defence had failed to create any reasonable doubt on the prosecution's case. The court accordingly found both the accused guilty as charged.

**[15]** The right to impose punishment is the sole and absolute domain of the court. The court has to consider the nature, gravity and seriousness of the offence, the antecedents of the accused and above all public interest. The court may also consider whether the accused is genuinely contrite and regretted his actions. In the instant case A1 displayed no sense of remorse but instead aggravated his position by his incessant show of arrogance and disrespect to the bench and his former cabinet colleagues and political allies. The only redeeming mitigating factor that deserved recognition and consideration was the fact that he had served the country as a politician for seventeen years.

*[A1 convicted as charged; nine years' imprisonment to run consecutively after the sentence A1 is currently serving.]*

*[A2 convicted as charged; six years' imprisonment from date of conviction and two strokes of the rotan on the first charge; six years' imprisonment and two strokes of the rotan on the second charge.]*

**Case(s) referred to:**
*Abdullah Zawawi v. PP [1985] 2 CLJ 2* ***(refd)***
*Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597* ***(foll)***
*Aziz Muhamad Din [1997] 1 CLJ Supp 523* ***(refd)***
*Bal Mukundo Singh v. Emperor [1937] 38 Cr LJ 70* ***(refd)***
*Bhuboni Sahu v. The King AIR [1949] PC 257* ***(refd)***
*Brabakaran v. PP [1966] 1 MLJ 64* ***(refd)***
*Chandrasekaran & Ors v. PP [1971] 1 MLJ 153* ***(refd)***
*Chean Siong Guat v. PP [1969] 2 MLJ 63* ***(foll)***
*Chin Seow Noi & Ors v. PP [1994] 1 SLR 135* ***(foll)***
*Chiu Nang Hong v. PP [1965] 31 MLJ 40* ***(refd)***
*Coward v. Stapleton [1953] 90 CLR 573* ***(refd)***
*Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645* ***(refd)***
*Dato' Mokhtar Hashim v. PP [1983] 2 MLJ 232* ***(refd)***
*Director of Public Prosecutions v. Kilbourne [1973] 1 All ER 440* ***(refd)***
*Emperor v. Sari Das AIR [1926] Lahore 375* ***(refd)***
*Ferguson v. Weaving [1951] 1 KB 814* ***(refd)***
*Ganpart v. Emperor AIR [1918] Lahore 322* ***(refd)***
*Gipp v. R [1988] 155 ALR 15* ***(foll)***
*Goh Ah Yew v. PP [1949] MLJ 150* ***(refd)***
*Gopala Rama [1896] Unrep Cr C 865* ***(refd)***
*Habeeb Mohamad v. State of Hyderabad AIR [1954] SC 51* ***(refd)***
*Hasibullah Mohd Ghazali v. PP [1993] 4 CLJ 535* ***(refd)***
*Herchun Singh & Ors v. PP [1969] 2 MLJ 209* ***(refd)***
*Ho Ming Siang v. PP [1966] 1 MLJ 252* ***(refd)***
*Hussin Sillit v. PP [1988] 2 CLJ 9* ***(foll)***
*Ibrahim v. King [1914] AC 599* ***(refd)***
*Illian & Anor v. PP [1988] 1 MLJ 421* ***(foll)***
*Jacob v. PP [1949] 15 MLJ 70* ***(refd)***
*Jaginder Singh & Ors v. Attorney-General [1983] 1 CLJ 69* ***(refd)***
*Juraimi Husin v. PP [1998] 2 CLJ 383* ***(refd)***
*Karpal Singh v. PP [1991] 2 CLJ 1458* ***(foll)***
*Kesavan Senderan v. PP [1999] 1 CLJ 343* ***(refd)***
*Khilumal v. Arjundas AIR [1959] Raj 280* ***(refd)***
*Koh Eng Soon v. Rex [1950] 16 MLJ 52* ***(refd)***
*Ku Lip See v. PP [1982] 1 MLJ 194* ***(refd)***
*Laxmi Raj Shetty v. State of Tamil Nadu AIR [1988] SC 1274* ***(refd)***
*Law Kiat Lang v. PP [1966] 1 MLJ 215* ***(refd)***
*Liew Kaling & Ors v. PP [1960] 26 MLJ 306* ***(foll)***
*Lim Guan Eng v. PP [1998] 3 CLJ 769* ***(foll)***
*Lim Kah Wan v. PP [1985] 2 CLJ 473* ***(refd)***
*Lim Yow Choon v. PP [1972] 1 MLJ 205* ***(refd)***

*Makin v. The Attorney-General for New South Wales [1894] AC 57* ***(foll)***
*Manipur State v. Naosekpam Nimai Singh & Anor AR [1953] Manipur 7 (Vol 40 CN 6)* ***(refd)***
*Mat v. PP [1963] 29 MLJ 263* ***(foll)***
*Miller v. Minister of pensions [1947] 2 All ER 372* ***(refd)***
*Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073* ***(foll)***
*Muthusamy v. PP [1948] MLJ 57* ***(refd)***
*Ng Kok Lian & Anor v. PP [1983] 2 CLJ 247* ***(refd)***
*Noliana Sulaiman v. PP [2001] 1 CLJ 36* ***(foll)***
*PP v. Aidil Maarof [1992] 2 CLJ 1239* ***(foll)***
*PP v. Chan Choon Keong & Ors [1989] 2 CLJ 216* ***(dist)***
*PP v. Chong Boo See [1988] 1 CLJ 679* ***(refd)***
*PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215* ***(refd)***
*PP v. Datuk Hj Harun Hj Idris & Ors [1977] 1 MLJ 180* ***(foll)***
*PP v. Datuk Hj Harun Hj Idris & Ors (No 2) [1977] 1 MLJ 15* ***(refd)***
*PP v. Hj Kassim [1971] 2 MLJ 115* ***(refd)***
*PP v. Kamde Raspani [1988] 1 CLJ 644* ***(refd)***
*PP v. Lam Peng Hoa [1996] 3 CLJ 747* ***(refd)***
*PP v. Law Say Seck & Ors [1971] 1 MLJ 199* ***(refd)***
*PP v. Lim Chen Len [1981] 2 MLJ 41* ***(refd)***
*PP v. Mardai [1950] 16 MLJ 33* ***(refd)***
*PP v. Mustaffa Ahmad [1986] 1 MLJ 302* ***(refd)***
*PP v. Ooi Wang San [1998] 3 CLJ 270* ***(refd)***
*PP v. Phon Nam [1989] 1 CLJ 6* ***(refd)***
*PP v. Tee Tean Siong & Ors [1963] 29 MLJ 201* ***(foll)***
*PP v. Veeran Kutty & Anor [1990] 2 CLJ 673* ***(refd)***
*R v. Baskerville [1916] 2 KB 658* ***(refd)***
*R v. Bow Street Metropolitan Majistrate and Ors; ex p Pinochet Ugarte (No 2) [1999] 1 All ER 577* ***(not foll)***
*R v. Brophy [1981] 2 All ER 705* ***(refd)***
*R v. Fulling [1987] 2 All ER 65* ***(refd)***
*R v. Priestly [1967] 51 Cr App R1* ***(refd)***
*R v. Severo Dossi [1918] 13 Cr App R 158* ***(refd)***
*R v. Watson [1980] 2 All ER 293* ***(foll)***
*Rajmal Marwadi v. Emperor [1925] Nagpur 372* ***(refd)***
*Ramli Kecik [1986] 2 MLJ 53* ***(refd)***
*Regina v. Mullins 3 Cox CC 526* ***(refd)***
*Ronald Wood Matham & Ors v. State of West Bengal AIR [1954] SC 455* ***(refd)***
*Sarwan Singh v. State of Punjab AIR [1957] SC 637* ***(refd)***
*Shankaria v. State of Rajasthan AIR [1978] SC 1248* ***(refd)***
*Shanmugam v. PP [1963] 29 MLJ 125* ***(foll)***
*Shri Ram v. State of UP AIR [1975] SC 175* ***(refd)***
*Sim Tiew Bee v. PP [1973] 2 MLJ 200* ***(refd)***
*Sjn Thomas Manivello v. Lt Kol Din Yati Dahlan & Ors [1998] 3 CLJ 761* ***(refd)***
*Srinivas Mall Bairoliya v. Emperor [1947] AIR PC 135* ***(refd)***
*Subramaniam v. PP [1956] 22 MLJ 220* ***(refd)***
*Tan Too Kia v. PP [1980] 2 MLJ 187* ***(refd)***

*The Queen v. Coney & Ors [1882] Vol VIII 534* ***(refd)***
*Ti Chuee Hing v. PP [1995] 3 CLJ 1* ***(refd)***
*TN Nathan v. PP [1978] 1 MLJ 134* ***(refd)***
*Transport Ministry v. Garry [1973] 1 NZLR 120* ***(refd)***
*Vasan Singh v. PP [1989] 2 CLJ 402* ***(refd)***
*W v. Egdell & Ors [1989] 2 WLR 689* ***(refd)***
*Wong Kam Ming v. R [1979] 1 All ER 939* ***(refd)***
*Wong Sin Chong & Anor v. Bhagwan Singh & Anor [1993] 4 CLJ 345* ***(refd)***
*Wong Swee Chin v. PP [1981] 1 MLJ 212* ***(refd)***
*Yaacob v. PP [1966] 1 MLJ 67* ***(refd)***
*Yap Chai Chai & Anor v. PP [1973] 1 MLJ 219* ***(refd)***
*Yau Heng Fang v. PP [1985] 2 CLJ 22* ***(refd)***

**Legislation referred to:**

Criminal Procedure Code, ss. 2, 112, 113, 115(1), (2), 117, 153(i), 180, 282(d), 288, 289(c), 290, 292, 376(1), 402(A)(1), 418A(1), 425
Emergency (Essential Powers) Ordinance No. 22 of 1970, s. 2(1)
Evidence Act 1950, ss. 8(2), 14, 17, 24, 26, 30, 35, 54, 74, 91, 92, 103, 126, 136(1), 139
Evidence Ordinance 1950, s. 126
Federal Constitution, art. 145(3)
Lock-up Rules 1953, r. 7
Penal Code, ss. 107, 109, 292(a), 354, 377A, 377B, 425
Statutory Declarations Act 1960, s. 2
Syariah Court Evidence (Federal Territories) Act 1997, s. 83
Syariah Criminal Offences Enactment 1991 (Melaka), ss. 52, 53(1)

Evidence Act 1872 [Ind], ss. 3, 30
Evidence Act [Sing], s. 30
Penal Code [Ind], s. 107
Police and Criminal Evidence Act 1984 [UK], s. 76(2)(a)

**Other source(s) referred to:**

Augustine Paul, *Evidence - Practice and Procedure,* 2nd edn, p 294
Augustine Paul, *Impeachment Proceedings,* p 79
Gour, *Penal Law of India,* 10th edn, vol 4, p 3237
Ratanlal & Dhirajlal, *Law of Crimes,* 24th edn, vol 2, p 1800

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*Reported by K Ganesh*

## JUDGMENT

**Arifin Jaka J:**

This is a joint trial of both the accused herein who are being charged separately for offences under the Penal Code. In Criminal Trial No: 45-51-98 the accused Dato' Seri Anwar bin Ibrahim ( hereinafter referred to as "Dato' Seri Anwar") was first produced before the Sessions Court Judge Kuala Lumpur on 29 September 1998 charged with an offence punishable under s. 377B of the Penal Code. The charge as originally framed reads as follows:

> Bahawa kamu pada satu malam dalam bulan Mei 1994, lebih kurang jam 7.45, di Unit No. 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, dalam Wilayah Persekutuan Kuala Lumpur telah dengan sengaja melakukan persetubuhan yang bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar dengan memasukkan zakar kamu ke dalam duburnya dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 377B Kanun Keseksaan.

The case was transferred to the High Court in Kuala Lumpur pursuant to the certificate (P1) issued by the Public Prosecutor in the exercise of his powers under s. 418A(1) of the Criminal Procedure Code and was mentioned before the High Court judge on 10 October 1998. The case came up for mention again before the court on 14 April 1999, 27 April 1999 and 4 May 1999. On 27 April 1999 the prosecution amended the original charge in respect of the year 1994 stated therein to read 1992. The charge as amended reads as follows:

> Bahawa kamu, pada satu malam dalam bulan Mei 1992 lebih kurang jam 7.45; di Unit No.10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, dalam Wilayah Persekutuan Kuala Lumpur telah dengan sengaja melakukan persetubuhan yang bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar dengan memasukkan zakar kamu ke dalam duburnya dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 377B Kanun Keseksaan.

In Criminal Trial No: 45-26-99 Sukma Darmawan Sasmitaat Madja (hereinafter referred to as 'Sukma") was first produced before the Sessions Court Judge on 23 April 1999 charged with two offences firstly for abetting Dato' Seri Anwar in committing carnal intercourse against the order of nature in May 1992, an offence punishable under s. 109 read with s. 377B of the Penal Code and secondly for committing an offence punishable under s. 377B of the same Code. The charges as originally framed read as follows:

**Pertuduhan Pertama**

Bahawa, pada satu malam dalam bulan Mei 1992, lebih kurang jam 7.45, di Unit No. 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, dalam Wilayah Persekutuan Kuala Lumpur, Dato' Seri Anwar bin Ibrahim telah melakukan persetubuhan yang bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar, di mana Dato' Seri Anwar bin Ibrahim tersebut telah memasukkan zakarnya ke dalam dubur Azizan bin Abu Bakar dan kamu pada hari dan di tempat yang sama, telah bersubahat melakukan kesalahan tersebut di mana kesalahan tersebut telah dilakukan hasil daripada persubahatan kamu, dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 109 dibaca bersama seksyen 377B Kanun Keseksaan (NMB Bab 45).

**Pertuduhan Kedua**

Bahawa kamu, pada satu malam dalam bulan Mei 1992 lebih kurang jam 7.45, di Unit No. 10-7-2, Tivoli Villa, Jalan Medang Tanduk, dalam Wilayah Persekutuan Kuala Lumpur telah dengan sengaja melakukan persetubuhan yang bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar dengan memasukkan zakar kamu ke dalam dubur Azizan bin Abu Bakar tersebut dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 377B Kanun Keseksaan (NMB Bab 45).

The case was also transferred to the High Court on a certificate (P2) issued by the Public Prosecutor by virtue of his powers under s. 418A(1) of the Criminal Procedure Code (FMS Cap. 6).

The joint trial commenced from 7 June 1999 and was concluded on 8 August 2000 which spread over a period of fourteen months. The trial took a long time to conclude due to intermittent postponements at the request of both parties and due to unavoidable circumstances. At the commencement of the trial on 7 June 1999 the amended charge against Dato' Seri Anwar was amended again in respect of "dalam bulan Mei 1992" to read "di antara bulan Januari hingga Mac 1993" (the second amendment). The charges against Sukma was also amended in the same manner ie, in respect of the year 1992 to read "di antara bulan Januari hingga Mac 1993".

The charge against Dato' Seri Anwar as finally amended reads as follows:

Bahawa kamu, pada satu malam di antara bulan Januari hingga Mac 1993; lebih kurang jam 7.45 malam di unit No-10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar dalam Wilayah Persekutuan Kuala Lumpur telah dengan sengaja melakukan persetubuhan bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar dengan memasukkan zakar kamu ke dalam duburnya dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 377B Kanun Keseksaan (NMB Bab 45).

**English Translation:**

That you, on one night between the months of January to March 1993, at or about 7.45 at Unit No 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, in the Federal Territory of Kuala Lumpur, did voluntarily commit carnal intercourse against the order of nature with Azizan bin Abu Bakar by introducing your penis into his anus, and you have thereby committed an offence punishable under section 377B of the Penal Code (FMS Cap 45).

The charges against Sukma were amended and are as follows:

**Pertuduhan Pertama:**

Bahawa, pada satu malam di antara bulan Januari hingga Mac 1993, lebih kurang jam 7.45, di Unit No 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, dalam Wilayah Persekutuan Kuala Lumpur, Dato' Seri Anwar bin Ibrahim telah melakukan persetubuhan yang bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar di mana Dato' Seri Anwar bin Ibrahim tersebut telah memasukkan zakarnya di dalam dubur Azizan bin Abu Bakar dan kamu pada hari dan tempat yang sama, telah bersubahat melakukan kesalahan tersebut di mana kesalahan tersebut telah dilakukan hasil daripada persubahatan kamu, dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 109 dibaca bersama seksyen 377B Kanun Keseksaan (NMB 45).

**English Translation:**

That, on one night between the months of January to March 1993, at or about 7.45 at Unit No 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, in the Federal Territory of Kuala Lumpur Dato' Seri Anwar bin Ibrahim did commit carnal intercourse against the order of nature with Azizan bin Abu Bakar to wit the said Dato' Seri Anwar bin Ibrahim did introduce his penis into the anus of Azizan bin Abu Bakar and that you on the same day and at the same place did abet in the commission of the said offence where the said offence was committed in consequence of your abetment and you have thereby committed an offence punishable under section 109 read together with section 377B of the Penal Code (FMS Cap 45).

**Pertuduhan Kedua:**

Bahawa kamu pada satu malam di antara bulan Januari hingga Mac 1993 lebih kurang jam 7.45, di Unit No 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar dalam Wilayah Persekutuan Kuala Lumpur, telah dengan sengaja melakukan persetubuhan bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar dengan memasukkan zakar kamu ke dalam dubur Azizan bin Abu Bakar tersebut dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 377B Kanun Keseksaan (NMB Bab 45).

**English translation:**

> That you, on one night between the months of January to March 1993, at or about 7.45, at Unit No 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, in the Federal Territory of Kuala Lumpur, did voluntarily commit carnal intercourse against the order of nature with Azizan bin Abu Bakar by introducing your penis into the anus of the said Azizan bin Abu Bakar, and you have thereby committed an offence punishable under section 377B of the Penal Code (FMS Cap 45).

Both the accused claimed trial to the charges and with the consent of all parties a joint trial of both accused was proceeded with. At the commencement of the trial counsels for both accused raised objections orally to the amendment of the charges on the principal ground that the amendment was made in bad faith and is an abuse of the process of the court. Counsels urged the court to disallow the amendment and strike out the charges against both accused. The question that has to be decided in respect of this application is whether the court can entertain such an application made orally to strike out the case summarily before evidence is adduced.

In *Karpal Singh v. Public Prosecutor* [1991] 2 CLJ 1458 at 1464 Tun Abdul Hamid Oman LP, in delivering judgment of the Supreme Court then, suggests the procedure to be followed in such an application as follows:

> Generally the procedure would appear to be that the accused should apply by motion to a High Court to quash the indictment and he then has to prove either on the face of the indictment or by an affidavit that the charge has been preferred without jurisdiction or has a substantial and apparent defect. We are not aware of any court acting merely on the oral statement of a counsel.

Guided by this pronouncement on the procedure I acceded to the request by the defence counsels for an adjournment to enable them to file a notice of motion to strike out the charges and the proceedings. Both accused filed separate applications by way of notice of motion in Criminal Application No. 44-27-1999 by Dato' Seri Anwar, and Criminal Application No. 44-25-1999 by Sukma. I dismissed the applications after a hearing as I found that there were no merits in the applications. The reasons for the dismissal are stated in detail in my grounds of judgment in the notice of motion. An appeal against my judgment is pending in the Court of Appeal.

Another point raised by Encik Karpal Singh on behalf of Sukma arising out of the amendment of the charges is in relation to the notice of alibi which has been given to the Public Prosecutor before the commencement

of this trial. Under s. 402(A)(1) of the Criminal Procedure Code it is provided that when an accused seeks to put forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused shall have given notice in writing thereof to the Public Prosecutor at least ten days before the commencement of the trial. It was pointed out by Encik Karpal Singh that Sukma has given notice of alibi in writing to the Public Prosecutor ten days before the commencement of trial on the basis of the charges before the amendment in compliance with s. 402(A)(1) of the Criminal Procedure Code. The current trial which is about to commence is on the basis of the amended charges. It was submitted that the accused in the instant case has to give fresh notice in writing to the Public Prosecutor at least ten days before the commencement of this trial. A trial is said to commence when the prosecution calls its first witness.

In *Sjn. Thomas a/l Manivello v. Lt. Kol. Din Yati bin Dahlan & Ors.* [1998] 3 CLJ 761 it was held, "A trial begins when the charge is read to the accused person and his plea taken but it only commences at the trial proper when the prosecution calls its first witness".

It was submitted by Encik Karpal Singh that if the notice is given just before the commencement of this trial then there is the risk that it is a mistrial as no sufficient notice has been given under the law. Encik Karpal Singh requested for an adjournment to enable Sukma to give a fresh notice to the Public Prosecutor. It is trite law that the requirement of pre-trial notice of alibi be given under s. 402(A)(1) is mandatory and the court has no discretion to waive it (see *Public Prosecutor v. Lim Chen Len* [1981] 2 MLJ 41 which is approved by the Federal Court in *Ku Lip See v. Public Prosecutor* [1982] 1 MLJ 194 and *Vasan Singh v. Public Prosecutor* [1989] 2 CLJ 402.

The issue to be decided is whether the accused is under a duty to give a fresh notice of alibi in view of the amendment to the charges. The prosecution conceded that the accused are at liberty to give notice if they want to do so. It was further submitted that the accused need not give a fresh notice of alibi as the notice that has been served earlier is valid.

In *Hussin bin Sillit v. Public Prosecutor* [1988] 2 CLJ 9 the Supreme Court had the occasion to consider the question of giving a fresh notice of alibi as required under s. 402(A)(1) after the original charge had been amended. It says at p. 15:

> We would hasten to add that if alibi notice had been served in relation to the original charge, then the accused would be under no duty pursuant to the provisions of section 402A to serve a second notice merely because the prosecution had elected to amend the charge at the commencement or in the course of the trial.

I am of the view that the notice of alibi given earlier by the accused to the Public Prosecutor in the instant case in relation to the original charge is valid and remains effective despite the amendment of the charges at the commencement of this trial. On the authority of *Hussin bin Sillit*'s case, I rule that it is not necessary for the accused to give a fresh notice of alibi to the Public Prosecutor as in the circumstances the requirements under s. 402A(1) has been duly complied with. The accused is entitled to give evidence in support of the defence of alibi at the trial.

**The Prosecution Case**

The prosecution led evidence through nine witnesses to prove its case beyond reasonable doubt on the truth of the charges against both accused and the evidence are as follows.

The prosecution started to unfold its story through Azizan bin Abu Bakar (SP6) – ("Azizan"). He served as a driven to Datin Seri Dr. Wan Azizah from early 1989 to September 1992 and for a brief spell of two weeks in 1994 before the Hari Raya Puasa. Except for the period of two weeks in 1994 Azizan was employed as a driver by Sime Darby Sdn. Bhd. from early October 1992 to early 1996. From January 1996 to the middle of August 1997 he was employed as a driver to Shamsidar bte Taharin, the wife of Mohd Azmin bin Ali who was at that time the private secretary of Dato' Seri Anwar. Azizan is currently the Marketing and Administrative Manager of Syarikat Destine Trading Sdn. Bhd. at Alor Gajah, Melaka but does not own any shares in the company. He spent eleven gruelling days in the witness box, three days in examination-in-chief, seven days in cross-examination and one day in re-examination. Because his evidence was relied upon principally by the prosecution to prove its case a meticulous and careful scrutiny of his evidence is necessary.

Azizan came to know Sukma who was the adopted brother of Dato' Seri Anwar when he (Azizan) was working as a driver to Datin Seri Dr. Wan Azizah, Dato' Seri Anwar's wife. Sukma stayed at that time at Dato' Seri Anwar's house. He also knew that from early 1993 Sukma stayed in an apartment at Tivoli Villa, Jalan Medang Tandok, Bangsar, Kuala Lumpur.

One afternoon between the months of January and March 1993 (he cannot remember the exact date) he met Sukma at Dato' Seri Anwar's house at No 8, Jalan Setia Murni Satu, Bukit Damansara, Kuala Lumpur. Azizan went to the house for the purpose of visiting Dato' Seri Anwar's children who were close to him. Sukma invited him to visit his apartment at Tivoli Villa. This was the first time he visited the apartment. Sukma did not tell him the purpose for inviting him to the apartment. On the same day in

the evening Azizan went to the apartment. He drove his own car to the place and arrived there at about 7.15pm. On arrival he was stopped by the security guard on duty at the entrance to the condominium as he had no car sticker. The guard checked with Sukma by phone. He was allowed in and with the help of the security guard he managed to locate the apartment which is known as No 10-7-2.

On arrival at the apartment, Sukma himself opened the door and invited him in. He was surprised and stunned when he saw Dato' Seri Anwar was present in the sitting room. He was surprised as he did not expect Dato' Seri Anwar to be there as well. Sukma did not tell him (Azizan) at the time when he invited Azizan to the apartment that some other people would also be in the apartment. Dato' Seri Anwar signaled by using his hand to Azizan to go into a room which was in fact a bedroom. He was followed into the bedroom by both accused. Azizan continued giving evidence in camera, and narrated in great detail what happened in the bedroom. He said that Dato' Seri Anwar asked him to remove his shirt but he was reluctant to do so as he was sure he would be sodomised. This evidence was objected to by Mr Fernando on behalf of Dato' Seri Anwar on the ground that it is inadmissible, irrelevant and highly prejudicial. I overruled the objection and admitted the evidence as relevant under s. 14 of the Evidence Act being facts showing the existence of the state of mind of Azizan and the intention of Dato' Seri Anwar which is relevant to the issue before this court.

Azizan further said that Dato' Seri Anwar removed his clothings and he was completely naked. In such a situation which was forced on him, Azizan removed his shirt and trousers except his underwear. He said he was shy to remove his underwear. At that time Sukma who was fully dressed was also in the bedroom. Dato' Seri Anwar who was by then lying on the bed pulled Azizan to the bed and removed Azizan's underwear who was by then lying on the bed. What transpired thereafter was clearly narrated by Azizan. He started by unfolding the preliminary acts performed by Dato' Seri Anwar before the actual act of sodomy was committed. At the request of Dato' Seri Anwar, Azizan sucked his penis. Dato' Seri Anwar kissed him "dan memperlakukan saya sebagai seorang perempuan dengan mencium saya di bahagian leher, telinga dan kedua-dua puting dada saya".

Azizan proceeded to describe how this act of sodomy was committed on him. Dato' Seri Anwar inserted his penis into Azizan's anus when he was lying on his back on bed. While in that position Azizan said, "pada mulanya dia mengangkat kedua-dua belah kaki saya dengan tangannya dan memasukkan zakarnya ke dalam jubur saya". Dato' Seri Anwar's penis

remained in his anus for about two minutes and Azizan complained of pain. Dato' Seri Anwar then pulled out his penis and applied some cream to it and also around Azizan's anus. He then sodomised Azizan who was then in the "menonggeng" position from behind for quite sometime until he reached orgasm.

Dato' Seri Anwar then went to the bathroom. At that time Azizan was still in the "menonggeng" position. He saw Sukma was already naked. Sukma was in standing position and he pulled Azizan towards him and sodomised Azizan from behind while in the "menonggeng" position.

Azizan said he was annoyed with both the accused because they had sodomised him. He said he allowed Dato' Seri Anwar to sodomise him because he was scared of him as he was the Minister of Finance at that time and he feared that Dato' Seri Anwar would take action against him. As for Sukma, Azizan said he allowed him to sodomise him (Azizan) because he was scared Dato' Seri Anwar was present in the room and Azizan was under the impression that both the accused had conspired (berpakat) to sodomise him.

Azizan also testified that he would not have gone to Sukma's apartment if he knew that he would be sodomised. He said that before the incident at the apartment as referred to in the changes in this instant case he had been sodomised without his consent more than once by the same person in early 1992. He was further asked: "Orang yang awak katakan meliwat awak lebih dari satu kali pada awal tahun 1992, siapakah orang itu?"

This question was objected to strenuously by the defence counsel for both accused. It was contended by Encik Fernando that by asking this question, the prosecution is to adduce bad character evidence which is irrelevant and highly prejudicial to Dato' Seri Anwar. The prosecution contended that the question is permissible to show the state of Azizan's mind at that stage which is relevant under s. 14 of the Evidence Act 1950, which is knowledge of Azizan that Dato' Seri Anwar would sodomise him. The question was asked to find out from Azizan and to confirm the fact that he would not have gone to Sukma's apartment if he was told by Sukma that Dato' Seri Anwar would also be at the apartment at the same time when he was there. After hearing arguments I made a ruling allowing the question to be asked as I am of the view that the answer to the question would be relevant as evidence to show the state of mind of Azizan at that time which is relevant under s. 14 of the Evidence Act 1950 and not for the purpose of showing that Dato' Seri Anwar had committed other offences.

Azizan proceeded with his testimony and said that he made a sworn declaration (akuan bersumpah) (exh. P5) alleging that he has been sodomised by Dato' Seri Anwar in and around 1992. He alleged in P5 that he was sodomised by Dato' Seri Anwar without the public or his wife's knowledge in luxurious hotels such as PJ Hilton, Hyatt Saujana and Holiday Villa. He said he made the declaration without any motive or intention to topple Dato' Seri Anwar and it was made on his own free will.

Azizan said this declaration was drafted by Umi Hafilda on his instructions and he signed it. P5 was given to the Prime Minister and copies to lawyer Encik Karpal Singh and the police officers who recorded his statements.

After he left as a driver to Datin Seri Dr. Wan Azizah he came back to work as her driver at her request for about two weeks before Hari Raya in 1994 and left again because he feared that the incident which happened to him earlier may probably happen again to him.

He further testified that sometime at the end of June 1998 ASP Zull Aznam who was then the ADC to Dato' Seri Anwar contacted him by phone and requested him to go to the police quarters in the vicinity of the official residence of Dato' Seri Anwar. On arrival there, Zull Aznam told him that Dato' Seri Anwar wanted to meet him. Zull Aznam brought him to see Dato' Seri Anwar. There was a discussion between Dato' Seri Anwar and Azizan but not in the presence of ASP Zull Aznam. Dato' Seri Anwar asked Azizan to deny what he had stated in his declaration (P5) if he was called by the police. Azizan said he did not respond to the request because what he had stated in P5 was the truth and Dato' Seri Anwar had asked him to lie.

Azizan being the main and important witness was heavily, intensively and meticulously cross-examined by the defence counsels which at times amounted to harassment and lasting for seven days. His evidence in cross-examination are as follows. He confirmed that all the facts that he had stated in P5 came from him although it was prepared by Umi Hafilda. He said it is not true that except for the venues where he alleged that he was sodomised by Dato' Seri Anwar the rest of what were written in P5 came from Umi herself. He agreed that at the previous hearing of the case against Dato' Seri Anwar he told the count that he only told Umi Hafilda of the places where he was alleged to have been sodomised. He did not tell Umi about Tivoli Villa and the bungalow in Port Dickson. He only told her some of the places where he was sodomised. He testified he was brought by Umi Hafilda to meet Tan Sri Rahim Thamby Chik after P5 was sent to the Prime Minister and Ziela Jalil went along. The first time he met Umi concerning P5 was in early July 1997. He disclosed that he spent

two or three nights at Dr. Ristina Majid's house. He went there to seek shelter because he was scared as he was being followed by unknown persons whom he suspected to be police personnel. He denied the suggestion by the defence counsel that he spent two or three nights at Dr. Ristina's house because she was one of the conspirators to topple Dato' Seri Anwar and that she assured Azizan that he would be protected. He also denied this was the reason why he did not report to the police. Azizan also admitted Dr. Ristina introduced him to a person by the name of Taib Salamon and B.K Tan at Bangsar Shopping Complex in August 1997 in the presence of Umi Hafilda. He did not know who made the appointment for him to be introduced to Taib Salamon and B.K. Tan but he was under the impression that it was made by Dr. Ristina. At that time Azizan did not know that Taib Salamon was expelled as an officer from the police force. Nobody told him about this. He came to know only after he was arrested. Azizan further said that he did not tell the special branch that he was influenced by Taib Salamon to make the statutory declaration (P5). Azizan denied that Taib Salamon and B.K Tan were sent by Dato' Aziz Shamsudin to meet him under the disguise that they were from the special branch and that they told Azizan not to be scared and asked Azizan to write P5. He was arrested and was interrogated by the special branch before he was handed over to the Criminal Investigation Department (CID).

Azizan further testified the first statement he gave to the police was recorded by ASP Mazlan on 18 August 1997. He gave a number of statements after that but he cannot remember how many. The statements were recorded not by the same officer and amongst the officers who recorded his statements were ASP Rodwan and SAC1 Musa. He cannot remember for sure how many statements were taken from him but he was definite that in September 1998 one statement was taken and in 1999 one statement was taken on 1 June 1999 by SAC1 Musa. He confirmed that in the various statements he gave he did mention "liwat". He denied that his story that he was sodomised by Dato' Seri Anwar is fabricated. He also denied that he told Zull Aznam that he fabricated evidence that he was sodomised by Dato' Seri Anwar because of money or because he was asked by Umi Hafilda so that Dato' Seri Anwar would be removed as Deputy Prime Minister.

He admitted that in June 1998 he went to the Ministry of Finance to meet Encik Mohamad bin Ahmad who was the secretary of Dato Seri Anwar. He went there to enquire about an application for a contract made by Dato' Taufik Yap Abdullah who was one of the directors of Syarikat Destine Trading. He went there at the request of Lau Fong Wah, another director of the company. It was put to Azizan that he gave evidence in the previous

trial of Dato' Seri Anwar that Dato' Seri Anwar was reluctant to meet him. The prosecution objected to this question on the ground that they were unsure whether this is part of the evidence that was expunged by the learned judge from the record of that trial. Arguments were advanced by both parties on the issue whether this part of evidence was expunged but at the end of the day the prosecution withdrew the objection for the moment indicating they may raise the objection again if the defence challenge the credibility of Azizan based on the record in the previous proceedings. In answer to the suggestion by the defence Azizan denied that he said at the earlier trial Dato' Seri Anwar was reluctant to see him.

On being asked by Encik Fernando, the defence counsel for Dato' Seri Anwar, Azizan said he told the police he was sodomised by Dato' Seri Anwar but not in 1994. He did not know who told the police Dato' Seri Anwar sodomised him in 1992. He did not know who told the police Dato' Seri Anwar and Sukma sodomised him in May 1992 at Tivoli Villa. He agreed that he was not sodomised by Dato' Seri Anwar and Sukma in May 1992 at Tivoli Villa. He said SAC1 Musa did not ask him to amend the date but he (SAC1 Musa) only asked him to remember the date clearly in connection with the incident he was sodomised by Dato' Seri Anwar and Sukma. He did not agree to the suggestion by the defence counsel that SAC1 Musa forced him to amend the date from May 1992 to between January and March 1993 because Tivoli Villa did not exist in May 1992. He testified Sukma sodomised him for about five minutes. The bed on which he was sodomised was a queen size bed.

He further said he was working with Sime Darby as a driver at the time when he alleged he was sodomised by both the accused. He worked for six days in a week except on Sunday. He worked from 7.30 to 5.30pm. On the day when the alleged sodomy took place he went to Dato' Seri Anwar's house at about 3pm. He met Dato' Seri Anwar's three children. Before he went to the house he fetched his employer's children from Sekolah Kebangsaan Bukit Damansara and Sekolah Menengah Seri Hartamas. Before that he was at his office. The incident did not happen in the month of Ramadan. He cannot remember whether the incident took place on a Friday. He did not agree he could have been mistaken about the time when the sodomy took place because the incident happened four or five months after he left as a driver to Dato' Seri Wan Azizah in September 1992 and at a time when Sukma has just moved into occupation of Tivoli Villa. SAC1 Musa did not suggest the date between January to March 1993 but it was he who gave the date to SAC1 Musa.

The first time he went to Sukma's apartment was on the day the incident took place. He denied the suggestions by defence counsel that he helped Sukma to move his belongings to Tivoli Villa before January 1993.

The next witness for the prosecution was Senior Assistant Commissioner of Police SAC1 Musa bin Haji Hassan ("SAC1 Musa"). At that material time he was the Assistant Director of Prosecution and Legal Division of the Criminal Investigation Department ("CID"). His testimony may briefly be summarised as follows.

On 6 September 1998 at about 1pm he instructed ASP Rodwan to arrest Sukma and searched his house. He told ASP Rodwan that there was evidence Sukma was involved in homosexual activities. Encik Karpal Singh objected to the evidence on the ground it is hearsay. I overruled the objection. In my view it is not hearsay as the witness was actively involved in the investigation and therefore he has personal knowledge of the evidence. The witness was allowed to continue with his evidence. He said the arrest was in connection with Dang Wangi Police Report No: 144140/98. The report is about the book entitled "50 Dalil, Kenapa Anwar Tidak Boleh Jadi Perdana Menteri". On 1 June 1999 he met Azizan at 1.30pm at his office at his (SAC1 Musa's) request. He recorded a statement from Azizan. Before recording the statement he asked Azizan to recollect the date when he was sodomised for the first time by both the accused at Tivoli Villa. He asked Azizan to recollect the date because the date mentioned in the charge may not be accurate. He realised this after carrying on an investigation as a result of a notice of alibi given by the defence. Azizan told him that the first time he was sodomised by both the accused at Tivoli Villa was between January to March 1993. Azizan said he remembered the date as it was just after four or five months after his resignation as a driver to Datin Seri Wan Azizah and at that time Sukma has just moved into the apartment which he had bought. He said he did not send Azizan for a medical examination because the incident of sodomy took place about five years before and from his experience in investigating rape cases an incident that happened a long time before may not leave any traces.

He testified that in his investigation he did not find any conspiracy by anybody to use Azizan to topple Dato' Seri Anwar. He was cross examined at length by the counsel for Dato' Seri Anwar. He did not record the statement from Azizan on 18 August 1997. It was recorded by ASP Mazlan on his instruction. The date May 1992 which was not based on that statement but on a statement by Azizan recorded in 1998 by ASP Rodwan in connection with the investigation on "buku 50 Dalil". He did not agree

that from the 1997 statement there was no basis for any charge against both the accused. SAC1 Musa further testified he received the notice of alibi on 27 May 1999 and carried out a thorough investigation into the alibi as stated in the notice.

As a result of the investigation he found that the apartment referred to in the charges against both the accused has not been completed. He agreed that as the investigation officer he made a recommendation to the director of CID to refer the matter to the Attorney-General's Chambers. He also agreed that the statement recorded in 1998 by ASP Rodwan upon which the first amendment of the charge which stated the date is May 1992 was based had been blown wide open by the alibi. He did not recommend Azizan to be charged as Azizan had not made a false statement. The date May 1992 which was stated in the amended charge was not based on the statement dated 18 August 1997 but on a statement by Azizan recorded in 1998 by ASP Rodwan in connection with the investigation on the "buku 50 Dalil".

He did not agree that from the 1997 statement there was no basis for any charge against both the accused. He did not recommend Azizan to be charged for perjury as he had not made a false statement.

He agreed with the suggestion of the defence counsel that if the sodomy was committed for a period of less than five years at the time of the alleged commission, he would have sent the victim for medical examination. In 1997, he was the investigation officer. He agreed that at one stage that the original charge mentioned the year 1994 and that it was within time for him to send Azizan for medical examination. He did not send Azizan for medical examination because apart from his experience he also referred to medical books from which he formed the opinion that there would be no trace that a person has been raped or sodomised if the offence has been committed a long time ago. Based on the evidence pertaining to the issue of the medical examination on Azizan Encik Karpal Singh applied for this witness to be charged for contempt of court on the ground that he has lied in court when he testified on oath. He submitted that in one breath this witness said the cut off period for sending the victim of rape for medical examination is five years and in the other breath shortly or immediately after he said not five years. This is a serious contradiction which amount to lying in court.

A contempt of court is a serious offence; it is an act committed with the intention to interfere with the due administration of justice. In general a witness who gives false testimony in court on oath will be liable to prosecution for perjury. He would also expose himself to contempt of court

only if the false testimony amounts to interference obstruction or frustration of the administration of justice (see *Jaginder Singh & Ors v. Attorney-General* [1983] 1 CLJ 69). The Australian case of *Coward v. Stapleton* [1953] 90 CLR 573 was referred to in *Jaginder Singh*'s case where at p. 71 the facts of that case as stated briefly are that "the appellant was a bankrupt who in his public examination gave answers of which a substantial number represented, in the opinion of the Federal Court of bankruptcy, a shuffling and a fantastic attempt to conceal the truth about his financial dealings. The court thereupon ordered that the bankrupt be committed for contempt of court upon the basis that he had refused to answer questions. On appeal the High Court held that the order must mean that the learned judge considered that some of the purported answers not only were untrue but were so plainly absurd as to convey an intention not to give any real answers to the questions to which they related". Further his Lordship Raja Azlan Shah Ag. LP (as his Majesty then was) succinctly summarised at p. 71 the general proposition that emerged from the case as follows:

> What does emerge as a general proposition from *Coward v. Stapleton* is that 'there must be a manifestation in some form of an intention on the part of the witness not to give a real answer', a finding that takes the case across the borderline that separates perjury from contempt. False testimony, together with a refusal to answer questions amounts to an obstruction of the administration of justice which is punishable as a contempt; false testimony, without more, does not.

It is clearly established from the principles enunciated above that a witness commits contempt of court only if he has lied with the evinced intention to interfere with the administration of justice. Additionally it must be recognised that the summary jurisdiction of the court to punish for contempt is to be exercised with caution, and only when it is urgent and imperative to act immediately, but it should not shrink from exercising that jurisdiction where being satisfied beyond reasonable doubt of the contempt, it becomes in the particular circumstances its duty to do so (see *Jaginder Singh*'s case).

The issue at hand is whether in the instant case there is a basis for the application to charge SAC1 Musa for contempt of court. I have carefully considered the evidence given by this witness and the submissions by both the prosecution and the defence counsels. On the evidence, I find that the witness was expressing his opinion based on his experience and from what he gathered from books he read in the subject and come to a conclusion. His opinion may or may not be right. He is entitled to express his views on the subject. In my view SAC1 Musa was not lying. The answers he gave must be read in the context of the questions asked. He has not

finished his evidence and if there are any contractions in his evidence he may be able to explain and clarify during re-examination. There is no evidence to show that the witness had refused to answer any questions that were put to him and that the refusal to answer could be clothed with the evinced intention to interfere with the administration of justice. His opinion may or may not be right but that does not mean he was lying. For the above reasons, I found without any hesitation that the application to impeach SAC1 Musa was without merit and was therefore dismissed.

After the ruling SAC1 Musa was further cross-examined. He testified that Azizan made five statements in the course of the investigation. The first statement was recorded on 18 August 1997, the second statement on 3 September 1997, the third statement on 7 July 1998, the fourth statement on 3 October 1998 and the fifth statement on 1 June 1999. He recorded the fourth and fifth statements whilst the first and second statements were recorded by ASP Mazlan. He disagreed with the defence counsel's suggestion that all the statements are not consistent on the allegations of sodomy against both the accused. He explained the first and second statements were recorded pursuant to a report Travers Report No: 2706/96 lodged by ASP Zull Aznam in relation to an anonymous letter entitled "Talkin Untuk Anwar Ibrahim". He said that there was a basis for the investigation based on the letter.

No further action was taken as a result of the investigation because Dato' Seri Anwar directed the investigation to be closed. The matter was not taken up with the Prime Minister.

He said he did not know that on 24 August 1997 the Prime Minister came out with a public statement. He thought the statement was based on the report of the special branch investigation into the declaration by Azizan (P5) and Umi Hafilda's letter. The other three statements were recorded based on Dang Wangi Report No: 14140/98 (P8). He testified that there were no contradictions in the statements. When cross-examined further SAC1 Musa agreed that investigation could still be conducted into the alibi even when the trial is going on. He said he was prepared to investigate now into the alibi. Encik Karpal Singh picked this up as an issue and contended that in the interest of justice this witness should be allowed to carry out this investigation. When the trial resumed after a short recess the Attorney-General informed the court that he has advised SAC1 Musa that there was no need to investigate further into the alibi as the prosecution has the record and evidence with regard to the movement of Dato' Seri Anwar both in and outside this country from 1992 to date of his dismissal from the cabinet. Despite this information given by the

Attorney-General as the Public Prosecutor Encik Karpal Singh still insisted that SAC1 Musa be allowed to investigate further into the alibi notice as it is part and parcel of his duty. He submitted that SAC1 Musa who was the investigation officer had under oath agreed to carry out the investigation to verify the truth or otherwise of the alibi. This amounts to an undertaking by SAC1 Musa on oath which if not proceeded with would amount to a breach of the undertaking and any one who induces the witness to breach the undertaking would be a party to obstruction and frustration of the administration of justice.

In saying this the learned counsel was obviously referring to the Public Prosecutor when he gave the advice to SAC1 Musa not to carry further investigation into the alibi on the grounds which had been stated earlier in this judgment. It was further submitted that the failure to carry out investigation at this stage has placed the defence at a disadvantage as the date in the charge has been amended to between January and March 1993. With due respect I fail to see how the defence was placed to a disadvantage as a result of the amendment of the dates in the charges under the circumstances. After all the accused is not prevented from adducing evidence of alibi in the event if his defence is called in view of my ruling earlier in this judgment that the notice of alibi given by the defence before the amendment of the charges is still valid. The question whether further investigation into the alibi ought to be carried out by the police is entirely their choice. The police while carrying out the investigation is subject to the direction of the Attorney-General in his capacity as the Public Prosecutor who has the power and the discretion under art. 145(3) of the Federal Constitution to *inter alia* to conduct proceedings for an offence other than proceedings before a Syariah Court or a court-marshall. In addition under s. 376(1) of the Criminal Procedure Code, the Public Prosecutor has the control and direction of criminal proceedings under the Code. It is to be recognized that the purpose of giving notice of the alibi by the defence under the Criminal Procedure Code is to divert the mischief of the defence disclosing his defence of alibi at a late stage of the trial.

It is settled that once the defence of alibi is properly raised by the defence the prosecution has the discretion to investigate into the alibi if they feel like doing so. I made an observation and expressed my view that it is receipt of the notice. If they choose not to investigate it is their prerogative. They cannot be forced to investigate. The prosecution knows best the evidence they have in their possession to challenge the defence of alibi. It is the prosecution's own funeral if as a result of non-investigation the evidence adduced by the defence in support of the alibi is not challenged. The court will decide whether the defence of alibi will succeed or not on

the evidence available before the court. On that observation Encik Karpal Singh informed the court that he wished to proceed with the cross-examination of SAC1 Musa. Hence it was not necessary for me to make a ruling whether SAC1 Musa should be ordered to investigate further into the alibi.

In further cross-examination SAC1 Musa said that he did not record any statement from the Prime Minister and from Tan Sri Rahim Nor, the Inspector General of Police. He, however, recorded a statement from Ziela, Megat Junid's wife.

In re-examination he said he carried out an investigation on report of the notice of alibi on 27 May 1997. SAC1 Musa was the last witness called by the prosecution. At the end of his evidence both the prosecution and the defence agreed to address the court on the issue of the impeachment of Azizan bin Abu Bakar. I would deal with this issue first before hearing submission by both the prosecution and the defence at the end of the case for the prosecution.

**Impeachment Of Azizan bin Abu Bakar (SP6)**

The defence has embarked on the impeachment of Azizan bin Abu Bakar. An application to impeach the credit of Azizan was made by En. Fernando, the leading counsel for Dato' Seri Anwar on the basis that there is a contradiction between the statements he made when he gave evidence in the trial of Dato' Seri Anwar on charges of corrupt practices under the Emergency (Essential Powers) Ordinance No. 22 of 1970 Vide High Court Criminal Trial No. 45-48-98 and 45-49-98 (the earlier trial) and his testimony in the present trial. The defence alleged that there is a major contradiction between Azizan's statement in the earlier trial of Dato' Seri Anwar and his testimony in the present trial. The learned counsel produced the record of proceedings (D6) of the earlier trial.

It can be seen that he made two statements in the earlier trial:

(a) In examination-in-chief at p. 242 of D6 he said:

> Saya setuju bahawa Dato' Seri Anwar tidak meliwat saya sebab itulah saya masih pergi ke rumahnya antara tahun 1992 dan 1997. Jika tidak saya tentu menjauhkan diri dari rumahnya. ("the first statement")

(b) In re-examination at p. 273 of D6 he said:

> Selepas bulan sembilan 1992 sehingga sekarang tertuduh tidak meliwat saya. ("the second statement")

In his testimony from the witness box in the present trial Azizan said he was sodomised between the months of January and March 1993. I asked Azizan to explain the contradictions. On examining D6 it appears to me there are material contradictions between the statements he made in the earlier trial and his evidence in the present trial.

It is to be borne in mind that one of the principles involved in an impeachment proceeding is that where the witness does not admit making the previous statement then the previous statement must be proved (see *Muthusamy v. Public Prosecutor* [1948] MLJ 57). In our present case Azizan admitted making the statement and the need for proving the statement does not arise. The prosecution did, however, raise the issue that the first and second statements as stated in the record of the earlier trial was expunged by the learned judge from the record. This issue was not seriously pursued by the prosecution and the hearing continues whereby both the prosecution and the defence submitted on the impeachment of the witness.

Another principle of importance to be noted in an impeachment proceeding is that when a witness is shown to have made a previous statement inconsistent with the evidence by the witness at the trial, the evidence given at the trial shall be disregarded as unreliable (per Hashim Yeop, A. Sani J in *Dato' Mokhtar Hashim v. Public Prosecutor* [1983] 2 MLJ 232). It follows, therefore, the question that has to be determined is whether what Azizan had said in the earlier trial firstly that he was not sodomised by Dato' Seri Anwar and that was why he continued to go to Dato' Seri Anwar's house between 1992 and 1997 and secondly that he was not sodomised after September 1992 was inconsistent with his evidence in the present trial when he said he was sodomised between the months of January and March 1993. If there is inconsistency then the evidence in this instant trial would be disregarded as unreliable. To determine whether there is such an inconsistency, it is necessary to look at Azizan's explanation. His explanation can be found in his testimony in his own words from the witness box which reads as follows:

> Apabila saya katakan saya tidak diliwat selepas Mei 1992, di dalam perbicaraan dahulu saya maksudkan kejadian diliwat tidak berlaku di rumahnya. Itu adalah bagi menjawab soalan peguambela mengapa saya masih berkunjung ke rumah Dato' Seri Anwar. Kejadian liwat memang berlaku terhadap saya selepas Mei 1992 dan selepas saya berhenti kerja tetapi bukan berlaku di rumahnya. Saya juga ada memberitahu semasa perbicaraan dahulu kejadian tidak dapat saya lupakan berlaku di rumah Sukma di Tivoli Villa dan saya tidak ditanya tahun bila liwat itu berlaku. Apabila saya memberi keterangan di hadapan mahkamah ini itulah sebabnya saya beritahu liwat berlaku di dalam tahun 1993 di antara bulan Januari dan Mac 1993.

Azizan was cross-examined by En. Fernando and for the purpose of the impeachment proceeding it is necessary to refer only to his testimony in connection with the incident of sodomy which took place in Sukma's apartment at Tivoli Villa as stated in his explanation. He agreed with the suggestion of the learned counsel that he was not sodomised by Dato' Seri Anwar and Sukma in May 1992 at Tivoli Villa. As regards the incident which took place at Sukma's apartment, Azizan was emphatic that he was sodomised at Tivoli Villa between the months of January and March 1993 as can be gathered from the following question and answer:

Question: Adakah awak beritahu polis awak diliwat di antara Januari hingga Mac 1993 di Tivoli Villa?

Answer: Ia, ada.

It was contended by Encik Fernando that Azizan was not telling the truth, it was SAC1 Musa, the investigation officer who forced Azizan to change the date from May 1992 to between January and March 1993. On this point Azizan was asked:

Question: Jikalau awak cakap benar kenapa SAC1 Musa suruh awak pinda tarikh itu dari Mei 1992 ke Januari hingga Mac 1993?

Answer: SAC1 Musa suruh saya mengingatkan dengan jelas tentang saya diliwat oleh Dato' Seri Anwar dan Sukma di Tivoli Villa.

Question: Ini bermakna jikalau SAC1 Musa tidak suruh kamu pada 1/6/99 pinda tarikh itu tentu kamu tidak akan buat apa-apa?

Answer: Tidak setuju.

Question: Kamu setuju atas tindakan SAC1 Musa memaksa kamu meminda tarikh itu daripada Mei 1992 ke Januari hingga Mac 1993 kerana Tivoli Villa tidak wujud pada bulan Mei 1992?

Answer: Tidak setuju.

It is clear from the answers given by Azizan that he was not forced or asked by SAC1 Musa to say that the incident took place between the months of January and March 1993. SAC1 Musa only reminded Azizan to be sure of the incident of sodomy by both the accused at Tivoli Villa. In his evidence Azizan was emphatic that he was sodomised at Tivoli Villa between January and March 1993. I find that it was Azizan who told SAC1 Musa about the incident at Tivoli Villa and not SAC1 Musa who forced him to say that he was sodomised.

At the outset it should be noted that both the statements he made in the earlier trial were in answer to questions which are inter-connected in the sense that they relate to Azizan's visit to Dato' Seri Anwar's house between 1992 and 1997. The first statement was made in answer to the question put to the witness in cross-examination namely "I put it to you, you were not sodomised by Dato' Seri Anwar Ibrahim and that is why you continued to visit him in his house between 1992 and 1997 otherwise you would have kept far away".

The second statement was in answer to the question in re-examination:

> Adakah peristiwa liwat terhadap kamu oleh tertuduh masih berlaku selepas bulan sembilan 1992?

To my mind the two statements are the same in the sense that they are related to the same incident namely Azizan was sodomised after September 1992. Azizan in his explanation said what he meant when he said in the earlier trial that he was not sodomised after May 1992 was that he was not sodomised in Dato' Seri Anwar's house when he was asked "mengapa saya masih berkunjung ke rumah Dato' Seri Anwar". He further said without any reservation in his explanation that "kejadian liwat memang berlaku terhadap saya selepas Mei 1992 dan selepas saya berhenti kerja tetapi bukan di rumahnya".

It is to be noted that it is in evidence that Azizan stopped work as a driver to Datin Seri Dr. Wan Azizah at the end of September 1992. It is therefore crystal clear that his explanation covers the second statement as well. Under these circumstances, it is futile for the defence Counsel to maintain that Azizan has not explained the second statement he made in the earlier trial. It can be gathered clearly from his explanation he was sodomised after September 1992 but not in Dato' Seri Anwar's house but elsewhere. Azizan is very consistent with his story that he was not sodomised in the house but elsewhere after September 1992. He said this in the earlier trial where he said:

> Salah satu perbuatan yang tidak dapat saya lupakan ialah peristiwa di rumah Sukma di Tivoli Villa di mana tertuduh telah meliwat saya dahulu dan diikuti dengan adik angkatnya meliwat saya.

He also gave similar evidence to this effect in his testimony before this court with the addition that he was sodomised at Tivoli Villa between the months of January and March 1993.

On a close scrutiny of the explanation by Azizan, I find no difficulty in accepting it under the circumstances and on the evidence available. The explanation is logical and not inherently incredible bearing in mind the questions that were posed to him. The statements in question which form the basis of the impeachment of Azizan must be read in the context of the questions that were asked. I find that there is in fact no contradiction at all between what he had said in the previous trial and the evidence he gave in this instant proceedings in respect of the act of sodomy as stated in the charges against both accused. In any event, even assuming that there is a material contradiction I am more than satisfied that Azizan has successfully explained the contradiction for reasons stated above beyond any doubt. I therefore ruled that the impeachment proceeding failed and the credit of Azizan was saved and remained intact and further that in truth, in fact and in substance Azizan was a truthful witness.

**A Trial Within A Trial To Determine The Voluntariness Or Otherwise Of The Confession Of Sukma**

The next point in focus is the confession of Sukma. The prosecution seeks to admit the confession of Sukma through its witness En. Abdul Karim bin Abdul Jalil, a Sessions Court judge (formerly known as President of Sessions Court) Kuala Lumpur who recorded it in his chambers on 17 September 1998. The defence is vigorously contesting the admission in evidence of the confession on the ground that it was not made voluntarily. A trial within a trial was held to ascertain whether or not there was any substance in the objection taken by the counsels for the defence and this, as to be expected, took up a great deal of time.

At the commencement of the proceedings in the trial within a trial En. Karpal Singh, counsel for Dato' Seri Anwar raised a preliminary point as to whether the court has the jurisdiction to embark on the issue of admission of any statement or confession made by an accused person for purpose of use in this proceedings by holding a trial within a trial. The confession was recorded under s. 115 of the Criminal Procedure Code (FMS Cap 6) which gives the power to a Magistrate to record a statement or a confession made to him at any time before the commencement of the inquiry or trial.

The learned counsel submitted that s. 115 was enacted for the purpose of using the confession in the High Court after a preliminary enquiry in the Magistrate's Court. As a preliminary enquiry has been abolished, the High Court has no jurisdiction to conduct a trial within a trial and this would mean the confession can be used only in a Magistrate's Court. These cases against both accused were originally registered in the Sessions Court and

it was contended that even the Sessions Court cannot use the confession and therefore does not have the jurisdiction to enquire into the admissibility of the confession.

It cannot be denied that the charges against both accused were originally registered in the Sessions Court but they were transferred legally to the High Court pursuant to s. 418A of the Criminal Procedure Code which provides the Public Prosecutor "may in any particular case triable by a criminal court subordinate to the High Court issue a certificate specifying the High Court in which the proceedings are to be instituted or transferred". The Public Prosecutor has acted under this provision and issued the said certificates (P1 and P2). Even though a preliminary enquiry has been abolished, these two cases are rightly brought for trial in the High Court under the said certificates issued pursuant to s. 418A of the Criminal Procedure Code.

In my view the High Court has the jurisdiction to decide the question of admissibility of the confession made by Sukma to Encik Karim who acted in his capacity as a magistrate. This is clearly borne by the wordings of s. 115(1) which says that the statement or confession may be recorded by the magistrate at any time before the inquiry or trial. The words used are "inquiry or trial". Section 115 is only procedural in nature and imposes a duty on a magistrate to record a statement which could be used in any enquiry or trial. "Inquiry" as defined under s. 2 of the Criminal Procedure Code includes every inquiry conducted under this code before a magistrate. It is not confined only to a preliminary enquiry. Once the statement or confession is recorded by the magistrate it can be used in any court if it is relevant and it becomes a duty of the trial court or the court which hears the inquiry to determine the admissibility of the statement or confession. Fon these reasons I am of the view that the preliminary point raised by the learned defence counsel is a non-issue and I therefore ruled that this court has the jurisdiction to hold a trial within a trial to determine the admissibility of the confession in this case.

The prosecution started by calling four witnesses to prove the voluntariness of the confession namely Abdul Karim bin Abdul Jalil (TPW1), Kathir Velayudhan a/l Pallniappan (TPW2), ASP Mohd. Rodwan bin Mohd. Yusof (TPW3) and ASP Zulkifly bin Mohamad (TPW4). At the end of the evidence given by these four witnesses the prosecution closes its case in the trial within a trial. Encik Karpal Singh then sought to make a submission of no case to answer at that stage. The learned Deputy Public Prosecutor objected saying that there is no such right open to the accused

at the end of the prosecution case. He relied on the speech of Lord Fraser in the House of Lord in *R v. Brophy* [1981] 2 All ER 705 at p. 709 (which is quoted in *Aziz bin Muhamad Din* [1997] 1 CLJ Supp 523 at p. 561):

> It is of the first importance for the administration of justice that any accused persons should feel completely free to give evidence at the *voire dire* of any improper methods by which a confession or admission has been extracted form him, for he can almost never make an effective challenge of its admissibility without giving evidence himself. He is thus virtually compelled to give evidence in the *voire dire* ...

The learned deputy pointed out that it is essential that accused must make a specific allegation and identify the officer as the person who has threatened or abused him (see *Tan Too Kia v. Public Prosecutor* [1980] 2 MLJ 187). It was further submitted that the court must be given an opportunity to hear all the evidence both by the prosecution and the defence in order to make a finding whether the confession is admissible or otherwise.

The issue at hand is whether the defence can make a submission. In *PP v. Aidil bin Maarof* [1992] 2 CLJ 1239, Chong Siew Fai J (as he then was) allowed the counsel for the defence to submit at the conclusion of the prosecution case although His Lordship overruled the defence counsel's submission and on the facts and evidence adduced by the prosecution His Lordship ordered the trial within a trial to continue.

With respect I agree with the procedure adopted by the learned judge in allowing the defence counsel to submit at the end of the prosecution case in a trial within a trial. I therefore allowed the defence counsel to make a submission of no case to answer at the end of the prosecution case. I venture to add that allowing the defence to make a submission of no case to answer at this stage, if allowed, would enable the court to make a ruling that the impugned confession or statement is inadmissible on the evidence adduced. The exercise would save time for the court as there is no need to proceed further with the trial within the trial. On the evidence led this far I take the view that the trial within the trial should continue.

The relevant statutory provisions to be considered relating to admissibility of the confession in this case are ss. 24 and 26 of the Evidence Act 1950. Section 24 provides that a confession is irrelevant in a criminal proceeding if the making of it appears to the court to have been induced by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would

appear to him reasonable for supposing that by making it he would gain any advantage or avoid an evil of a temporal nature in reference to the proceeding against him. Section 26 states that no confession made by any person whilst he is in the custody of the police officer, unless it is made in the immediate presence of a President of a Sessions Court or Magistrate, shall be proved against that person.

The central issue to be determined in the instant case is whether on the evidence adduced by the prosecution at the end of its case in the trial within the trial this court can and is justified to make a ruling that the confession made by Sukma is inadmissible and should therefore be excluded as evidence.

In determining this issue it is incumbent upon me to consider the grounds advanced by the defence counsel in urging me to make a ruling to exclude the confession. The learned defence counsels raised a number of points in their submission to support their contention that the confession is inadmissible and should therefore be excluded at this stage as the prosecution has not proved beyond reasonable doubt that the confession was made voluntarily. I shall now deal with the points raised by the defence counsels that are relevant.

Firstly, it was contended that there is no compliance of the provision of the law by the recording Sessions Court Judge who acted as a magistrate. It is to be noted that there is no dispute as to the capacity of the recording officer. In respect of the non-compliance it was submitted that:

(a) the magistrate did not record the confession in full as required. The recording of the confession made under s. 115 of the Criminal Procedure Code which lays down the procedure to be followed.

(b) the magistrate fails to ascertain where Sukma was detained before the recording of the confession and where he would be taken after the recordings.

(c) the magistrate did not take steps to ascertain the voluntariness of the confession.

(d) the magistrate did not use the word "didorong" in the confession.

(e) the magistrate has failed in his duty to inform Sukma that he can either make a statement or confession.

(f) there was no numbering of the pages and no signature on each page of the confession;

(g) omission by magistrate to ask for motive of Sukma in making the confession.

As to point (a) above the defence counsels alleged non-compliance of s. 115(2) of the Criminal Procedure Code which provides that such statement or confession should be recorded in full in writing by the magistrate to whom it is made and shall then be forwarded to the magistrate if different before whom the case is to be enquired or tried. In this connection it was submitted that there is a direct infringement of this section by the magistrate by giving a copy of the confession to ASP Rodwan in an envelope who later gave it to SAC1 Musa. It is in evidence that a copy was indeed handed over by the magistrate to ASP Rodwan and that the original copy was kept by him. The question is whether there is an infringement of this section under these circumstances. I am of the view that this is not an infringement as it is clear this is not prohibited by this section. What the section requires *inter alia* is that the confession shall be forwarded to the magistrate before whom the case is to be inquired or tried. It does not mean that he should not give it to the police. In any event the handing over of a copy of the confession does not prejudice Sukma at all. The section also requires that the confession should be recorded in full. The recording magistrate in his testimony said that the confession contains what Sukma told him when the confession was recorded. This implies he recorded the confession in full. On the above premise I hold that this ground fails.

As regards (b) above I have no hesitation to hold that the submission is without merit. It is not a requirement under the law that the magistrate is obliged to ascertain where Sukma was detained, for how long he was being detained and where he (Sukma) would be taken after the recording. It is no doubt provident for the magistrate to make each enquiry to assist him to come to a conclusion on the issue of voluntariness of the confession. He did make some enquiries shown in his evidence when he asked Sukma this:

Question: Bila awak ditangkap?

Answer: 6.9.1998, pukul 1.35 petang.

Question: Berapa lama awak ditahan?

Answer: 12 hari.

The next point taken up by the defence counsel was that the magistrate did not take steps to ascertain the voluntariness of the confession (point c above) on the evidence as it stands it is clear that the magistrate made a

genuine endeavour to find out to ascertain the voluntariness of the confession. He asked Sukma pertinent questions for the purpose of satisfying himself that Sukma wanted to make the confession voluntarily on his own free will. The questions and the answering given by Sukma *inter alia*, are as follows:

| | |
|---|---|
| Question: | Awak tahu saya siapa? |
| Answer: | Hakim |
| Question: | Kepada siapa awak mula-mula menyatakan niat awak hendak buat pengakuan ini? |
| Answer: | Kepada Pegawai Polis di Bukit Aman nama En. Rodwan Mohd Yusof. |
| Question: | Bila awak hendak membuat pengakuan ini? |
| Answer: | Semalam – 16/9/1998 |
| Question: | Adakah sesiapa yang mengugut atau paksa awak atau menyuruh awak buat pengakuan ini? |
| Answer: | Tidak ada sesiapa. |
| Question: | Sekarang masih ada masa jika awak ingin tukar fikiran awak, jika awak hendak dari membuat pengakuan. |
| Answer: | Saya masih dengan sukarela hendak membuat pengakuan ini. |
| Question: | Awak mesti tahu bahawa apa-apa percakapan atau pengakuan yang awak berikan kepada saya boleh digunakan terhadap awak dalam perbicaraan awak kelak. |
| Answer: | Saya fahami betul. Saya masih hendak buat pengakuan. |

The magistrate also took further precaution to find out whether there are injuries found on Sukma's body. He found no injuries from the waist upwards. He was told by Sukma that there were no injuries below his waist. Sukma did not complain about anything at all to him. When he recorded the confession he made sure that the police personnel who brought Sukma to him left the room and the handcuffs were removed. Only Sukma and the magistrate were in the room when the confession was recorded and the door to the room was closed. In cross-examination he reiterated what he had said earlier. He admitted that this is the first time he recorded a confession under s. 115 of the Criminal Procedure Code. He disagreed to the suggestion by the defence counsel that he did not comply with the requirements under s. 115. He said he did not know that Sukma had been under police detention for twelve days before he was brought before him and that while under such detention Sukma was subjected to rough and inhuman treatment. In re-examination he said that throughout the recording of the confession Sukma did not appear to be depressed (tertekan); in fear (bimbang), scared (ketakutan); confused (bingung). Sukma was relaxed and

calm throughout when the confession was recorded. En. Karim also said that Sukma did not at any time complain to him that he was treated roughly and in an inhuman manner while under detention. It is clear from this evidence that the magistrate had done more than what was necessary for him to do to ascertain the voluntariness of the confession. The allegation that what the magistrate did was mechanical has no merit at all. I am more than satisfied on the evidence that the magistrate had taken all necessary steps to satisfy himself that there was no inducement, threat or promise made by anyone to Sukma that prompted him to make the confession.

Point (d) above states that the magistrate did not use the word "dorong" in the confession. It was submitted by the defence that failure by the magistrate to use the word "didorong" (induced) at p. 6 of the confession would mean that the confession was not voluntarily made. The learned counsel relied on *Public Prosecutor v. Chan Choon Keong & Ors* [1989] 2 CLJ 216, where it was held *inter alia*, that the word "inducement" which is obtainable in s. 113 of the Criminal Procedure Code has to be explained and made understood to the accused who made the statement when administering the caution pursuant to that section and failure of the recording officer to give the correct word for "inducement" in Hokkien by the recording officer would result that a proper caution has not been administered as required under the section. In our instant case, there is no requirement for the magistrate who recorded the confession to explain the word "inducement" and made understood to Sukma as this is not required under s. 115 of the Criminal Procedure Code. The authority relied upon by the learned counsel concerns the caution to be administered as required under s. 113 of the Criminal Procedure Code and it does not apply in our case. In any event it is not correct for the learned counsel to say that the magistrate did not use the word "didorong". "Inducement" in Bahasa Malaysia means "memujuk" dan "mendorong" (see *Dwibahasa – Bahasa Inggeris-Bahasa Malaysia* (Dewan Bahasa dan Pustaka 1989). It is in evidence at p. 6 of the confession that the magistrate used the word "dipujuk" when he said:

> Saya berpuas hati beliau membuat pengakuannya dengan sukarela tanpa dipaksa, diugut, dipujuk atau pun dijanjikan apa-apa untuk membuat pengakuan ini.

Accordingly, I hold that the submission is devoid of any merit whatsoever. The next point raised (point (e)) is the magistrate has failed in his duty to inform Sukma that he can either make a statement or confession before recording the confession. I am of the view that there is no duty imposed on the magistrate under the law to inform Sukma that he can either make a confession or a statement as contended by the defence counsel. In any

event the magistrate did tell Sukma that "apa-apa percakapan atau pengakuan yang awak berikan kepada saya boleh digunakan terhadap awak dalam perbicaraan awak kelak". This serves as a caution to Sukma that whatever he said to him can be used against him at his trial. In my view this is sufficient safeguard to ensure that the magistrate is satisfied that the confession is made voluntarily. This point does not help Sukma at all too is without merit.

Point (f) highlighted that the pages in the confession (P4) were not numbered and not initialled. It was submitted that it was necessary that this should be done to avoid interloping and removal of the pages and there is a possibility this could have happened. It is not required under the law that every page should be numbered and initialled but it is only a matter of practice and prudence. There is no evidence to show that there were additions or subtractions in P4 as a result of the failure to number and initial on every page. The original of P4 has been in the custody of the magistrate who recorded it until it was produced in court when he gave evidence. In the absence of any contrary evidence I accept that P4 represents the true record of what transpired between the magistrate and Sukma. Accordingly I hold that this submission too has no merit.

It was also submitted that there is an omission on the part of the magistrate to record the questions asked and the answers thereto to show the motive of Sukma in making the confession. It is in evidence that the magistrate did not record in P4 two questions and the answers given by Sukma. The first question relates to the purpose (tujuan) of Sukma in making the confession. The second question was asked to find out whether there were injuries on Sukma. This evidence was elicited during cross-examination of the magistrate. It is to be noted that he was not asked what the questions and answers were. In re-examination, however, he confirmed that these two questions were not recorded but he was positive that he did ask these questions. The answer given by Sukma to the first question posed by the magistrate why he wanted to make the confession as in P4 was "lama sangat dalam dada saya hendak meluahkan segala-galanya". It was submitted on behalf of the defence that the question and answer as regards the motive of Sukma was an afterthought as it came about in cross-examination. This submission cannot be accepted as the omission to record the question and answer was highlighted only during cross-examination though he was never asked by the defence what the question and answer was. It was only right for the prosecution to re-examine the magistrate to bring out what the question and answer was, so that a proper meaning could be deduced from them. It was submitted further that is not enough

for the magistrate to say that he did put to Sukma questions and was satisfied that he would give the confession voluntarily. The learned magistrate ought to have recorded each and every question put to Sukma and the answers given by him more specifically those which go to prove the voluntary nature of the confession. Mere certificate of the magistrate in absence of any record of questions and answers that he was satisfied that the confession was a voluntary one is not conclusive and the confession may still be involuntary (see *Manipur State v. Naosekpam Nimai Singh and Another* – AR [1953] Manipur 7 (Vol 40 CN 6). It is to be noted that in that case the other questions which the magistrate asked were not disclosed to the court whereas in our instant case the question and answer to the important issue relating to motive was asked and disclosed to the court. The failure to record this question is not fatal as there is evidence that the magistrate had made enquiries to satisfy himself as to the voluntariness of the confession.

This brings me to the question whether the oral testimony given by the magistrate runs foul of ss. 91 and 92 of the Evidence Act 1950 and therefore inadmissible as contended by the defence counsel. It was submitted that no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from the confession shall be admitted. The confession according to the defence counsel is one matter required by law to be reduced to the form of a document and accordingly comes within the provision of ss. 91 and 92 of the Evidence Act 1950. The question is whether the confession is a document within the contemplation of the clause "any matter required by law to be reduced to the form of a document", as stated in ss. 91 and 92. The meaning and interpretation of this clause has been dealt with in *PP v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 at p. 183 where Abdoolcader J (as he then was) said:

> In the context of the wording in section 92 of the Evidence Act, the clause 'any matter required by law to be reduced to the form of a document' would appear to refer to bilateral instruments and dispositive documents only, such as contracts, grants or other dispositions of property, which the law requires to be reduced to writing and *not to every and all matters which the law requires to be reduced into a document, as for instance, the dispositions of witnesses which, though required by law to be reduced in the form of a document* would not come within this section and oral evidence is therefore admissible to contradiction such disposition. (emphasis added).

I would say for the same reasons the confession of an accused person though required by law to be reduced in the form of a document would not come within that section. On the authority of *PP v. Datuk Haji Harun*

*bin Haji Idris & Others* [1977] 1 MLJ 180, I hold that the oral testimony of the magistrate is admissible to show motive of Sukma to make the confession.

The second complaint by the defence was the failure of the prosecution to call SAC1 Musa who was the investigation officer and Sampornak who was the leader of the team who interrogated Sukma. It was submitted by the defence what happened to Sukma during the period of his detention from 6 September 1998 to 17 September 1998 was not explained. These witnesses were not offered to the defence. There was a very serious gap in the prosecution case. The court should not be left to indulge in conjectures and possibilities (see *Abdullah Zawawi v. Public Prosecutor* [1985] 2 CLJ 2 and *Ti Chuee Hing v. Public Prosecutor* [1995] 3 CLJ 1).

The onus is on the prosecution to prove voluntariness beyond reasonable doubt and not for the defence to prove involuntariness (see *Hasibullah bin Mohd. Ghazali v. PP* [1993] 4 CLJ 535 and *Ibrahim v. King* [1914] AC 599 which was followed in *Public Prosecutor v. Chong Boo See* [1988] 1 CLJ 679). The question of voluntariness involves a question of fact and must be decided on the evidence (*Yaacob v. Public Prosecutor* [1966] 1 MLJ 67). I am of the view that the proper stage for the court to decide whether the prosecution has discharged the burden of proving that the confession was made voluntary is at the end of the trial within the trial when all the evidence including the evidence to be given by the accused and by his other witness (if any) has been adduced before the court.

It is difficult for me to decide at the end of the case for the prosecution to make a ruling to exclude the confession at this stage solely on the evidence adduced by the prosecution without hearing the accused himself and his witness (if any). In *Wong Kam Ming v. R* [1979] 1 All ER 939 Lord Edmund Davies said at p. 945:

> As already been observed, an accused seeking to challenge the admissibility of a confession may for all practical purposes be obliged to testify in the *voire dire* if his challenge is to have any chance of succeeding.

In *R v. Brophy* [1981] 2 All ER 705 at p. 709 the speech of Lord Fraser in the House of Lords is instructive and relevant:

> It is of the first importance for the administration of justice that an accused person should feel completely free to give evidence at the *voire dire* of any improper methods by which a confession or admission has been extracted from him, for he can almost never make an effective challenge of its admissibility without giving evidence himself. He is thus virtually compelled, to give evidence in the *voire dire*.

Based on these authorities, I am of the view it is therefore essential and obligatory for Sukma to give evidence in the trial within the trial. However, I must say that I allowed the defence counsel to make a submission at the end of the prosecution to see whether there are grounds for me to determine the issue of voluntariness at that stage.

In appropriate cases, it is open to the court to rule after the prosecution has adduced evidence in a trial within a trial that the contested statement or confession is inadmissible on the grounds that there was evidence to show that it is satisfied beyond reasonable doubt that there was a breach of the essential requirements of the provision of the law under which the making of the confession was recorded or made or that the court is in doubt as to the voluntariness of the confession (see *Public Prosecutor v. Aidil bin Ma'rof* [1992] 2 CLJ 1239).

In the instant case on the evidence adduced by the prosecution I find that there is no breach of the provision of the law to justify this court to rule that the confession be excluded at this stage. I am satisfied that there is no doubt whatsoever as to the voluntariness of the confession on the evidence adduced by the prosecution this far. There is no evidence of any threat, inducement or promise coming from a person in authority. I also find there are no gaps in the prosecution case on the evidence adduced so far by the prosecution. As I had said earlier the court would be in a better position to decide on the voluntariness of the confession after hearing all the evidence and the facts at the conclusion of the trial within a trial. The prosecution may adduce further evidence in rebuttal after the evidence to be adduced by the defence. In conclusion I find that there is sufficient evidence at this stage to enable the court to conclude that there was compliance with the requirements of the law as laid down under s. 115 of the Criminal Procedure Code and that no threat, inducement or promise was made to Sukma. For the above reasons I rule that the trial within the trial is to proceed with the direction that Sukma be called to give evidence and to call other witnesses, if he so desires. At the end of the trial within the trial and after hearing the evidence to be adduced by the defence and the rebuttal evidence, if any, to be adduced by the prosecution, I shall then consider on the totality of the evidence and the cumulative effect whether the confession is admissible or otherwise.

I shall now proceed to consider whether the confession (P4) is voluntary. In considering voluntariness I am fully aware that the onus is on the prosecutor to prove voluntariness beyond all reasonable doubt and not for the defence to prove involuntariness. (see *Ibrahim v. King* [1914] AC 599 followed in *Dato' Mokhtar bin Hashim & Anor. v. PP* [1983] 2 MLJ 232

and *Public Prosecutor v. Chong Boo See* [1988] 1 CLJ 679). It is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt (see *Shankar v. State of Rajasthan* AIR [1978], Supreme Court 1248). The confession must be made voluntarily in the sense that it was not made as a result of any inducement, threat or promise. Section 24 of the Evidence Act 1950 states that if the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him the confession is irrelevant and must be excluded. In order to warrant rejection of the confession all that has to be shown is a probability that it was not voluntarily made. A confession can be rejected on a valid ground or conjecture but there must be evidence or circumstances on which the conjecture can rest. If the accused is able to point to some circumstances which raise suspicion the confession cannot be admitted. A mere possibility that the confession was not voluntarily made is insufficient to warrant its rejection but a probability would suffice to warrant its rejection in evidence (*PP v. Law Say Seck & Ors.* [1971] 1 MLJ 199).

The trial within trial proceeded with Sukma himself giving evidence followed by four other witnesses on his behalf. The prosecution then called SAC1 Musa, the investigation officer, Chief Inspector Sampornak, the leader of the investigation team, five detectives who were members of the investigation team and three police personnel who were on duty at the lock up on the relevant dates for the purpose of adducing evidence in rebuttal. The witness gave lengthy evidence and some of them were subjected to lengthy cross-examination. I do not propose to deal with the evidence which I have carefully considered in great detail but shall refer to the relevant evidence when I deal with the points raised by the defence in their submission. At the end of the trial within the trial, Encik Karpal Singh again submitted at great length on the issue of non-compliance with s. 115 of the Criminal Procedure Code. I had carefully considered the submission of the learned defence counsel on this issue earlier at the end of the case for the prosecution in the trial within the trial and had ruled that there was due compliance with the section. It is therefore not necessary for me to reconsider this issue again as it would be sheer repetition.

In his evidence Sukma made various allegations with regard to the manner of his arrest on 6 September 1998, the treatment he received on the same day, the condition of the lock up cell in which he was kept during his

detention, the manner he was interrogated by the interrogating team. He also alleged that he was subjected generally to inhuman treatment. In addition to these allegations, Sukma mentioned three specific instances which according to him show that the confession he made was made involuntarily. First he claimed he was forced by ASP Rodwan to make a statement to him about his homosexual relationship with Dato' Seri Anwar before he was produced before the magistrate on 7 September 1998 for the purpose of obtaining a further remand order. It was also alleged later on the same day that after the remand order was obtained, ASP Rodwan threatened him by saying that as he is now under his custody it is better for him to tell him (ASP Rodwan) about his relationship with Dato' Seri Anwar if he wants to go home early and does not have to wait for fourteen days or else he would be handed over to a special investigation team who are very rough and he would regret it.

Secondly, he claimed on 10 September 1998, he was threatened by Chief Inspector Sampornak (Sampornak) by saying that he would be detained under the Internal Security Act for two years which can be extended for a further two years and the photographs taken during the medical examination on him by Dr. Zahari Nor (TDW5) would be used as evidence against him if he does not follow what the investigation team want him to say. He also alleged that Sampornak said the police would plant bullets in his car which was parked at Bukit Aman as bullets are cheap costing only 45 cents each, he would be charged like Dato' Nallakaruppan and would be hanged and the police would hire a killer to shoot him and nobody would suspect that he was shot by the police. All these allegations were denied by Sampornak. I believe Sampornak and find that he did not threaten Sukma as alleged. I come to this finding for the simple reason that the allegation is beyond comprehension that for that matter any member of the investigating team would ever think of planting the bullets in Sukma's car as the car was returned on the same day ie, 10 September to one of his friends. If it was true the police had such an intention why should they return the car? One would expect and surely the police would keep the car so that they can accomplish that mission to plant the bullets in the car. Again it is also unbelievable that the police would hire a killer to shoot Sukma whilst he was in custody. It would be a suicidal and foolish act for the police to do this. As regards the photographs, the evidence show that neither Sampornak nor any member of the investigation team knew the photographs existed. It, therefore, cannot be true that Sampornak ever said that the photographs would be used as evidence against Sukma. As regards the allegations that Sukma would be detained under the Internal Security Act, I find it difficult to believe that Sampornak ever said this.

Sukma was under detention for alleged sexual offence of sodomy according to SAC1 Musa, and on 7 September 1998 he was on further remand for fourteen days pursuant to a court order under s. 117 of the Criminal Procedure Code. He was not being detained under the Internal Security Act. If the police was mindful of detaining him under the Internal Security Act, they would have done so from the very beginning and they do not have to get a further remand to detain Sukma. For this reason I find the allegations are baseless and I rule there was no such threat held out by the investigating team on Sukma.

The third instance alleged by Sukma that on 16 September 1998, ASP Rodwan again promised Sukma that he would be released the next day after making the confession to the magistrate. I find that there is no evidence to show that ASP Rodwan ever met him between 7.30pm to 8.30pm on that day. There was, however, evidence from the lock up register that ASP Rodwan met him behind the counter outside the cell. ASP Rodwan denied he made the promise as alleged at that meeting. The meeting was a short one and other police personnel were present. It is very improbable that ASP Rodwan would make such a promise in the presence of the other personnel. I accept ASP Rodwan's explanation that he met Sukma to enquire about his well being and during the meeting it was Sukma who told him that he wanted to make a statement. As a result of this, ASP Rodwan arranged for Sukma to meet SAC1 Musa who directed to videotape what Sukma said. It was videotaped to avoid allegations. I have no reason to disbelieve ASP Rodwan under these circumstances.

The other allegation made by Sukma was that he was programmed systematically into making the confession. It was submitted by the defence that the programming is evidenced by the fact that Sampornak made notes when he interrogated Sukma. He forwarded it to SAC1 Musa who would content himself Sukma was making progress as noted by Sampornak. The interrogation was carried until 15 September 1998, whereby the information required by the police from Sukma was put into his month. I find that there is no evidence to suggest this programming, leave alone it was indeed done, because the purpose of the interrogation was to obtain an intelligence statement. The allegations of programming is a mere allegation unsupported by evidence. The defence tried to convince this court that there was such a programming by relying on the statement that was made on videotape on 16 September 1998, a day before the confession was recorded. It was contended the videotaped statement was made to ensure that Sukma would repeat what he had said in the videotape as programmed, to the magistrate when he made the confession the next day. I am of the view that the police is entitled to record the statements on videotape in the course of their

investigation and also to have a confession recorded before a magistrate under the law. The mere fact that a videotaped statement was taken does not necessarily mean that he was programmed into making the confession. There is no evidence what the tape contained as the prosecution was not relying on it and the court is in no position to arrive at a ruling that there was indeed a programming of Sukma in making the confession under these circumstances.

There is another point which needs consideration and it is this: Whether the evidence and circumstances in this case would have sapped the free will of Sukma when he made the confession, in the sense that the confession was made under oppressive circumstances. The word oppression "imports something which tends to sap, and has sapped, that freewill which must exist before a confession is voluntary. Whether or not there is oppression in an individual case depends upon many elements. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement" – per Sachs J in *R v. Priestly* [1967] 51 Cr. App. R1.

In *R v. Fulling* [1987] 2 All ER 65 Lord Lane CJ was of the view that oppression as found in s. 76(2)(a) Police and Criminal Evidence Act 1984 (England) should be given its ordinary dictionary meaning. The *Oxford English Dictionary* the definition of the oppression runs as follows:

> Exercise of authority or power in a burdensome, hash or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc., the imposition of unreasonable or unjust burdens.

In our local jurisdiction oppression is recognised as one of the grounds for excluding a statement or confession (see *Dato' Mokhtar Hashim v. PP* [1983] 2 MLJ 232 – Federal Court.)

Bearing the above principle in mind, I now turn to consider the question whether the confession was obtained from Sukma in circumstances which amount to oppression within the definition by Sachs J in *R v. Priestly* [1967] 51 Cr. App. R1.

It was alleged by Sukma that he was subjected to embarrassment and humiliation at the time of his arrest on 6 September 1998. He was handcuffed and his car was searched in public. The police was carrying out their duty and I find there was nothing abnormal or illegal in what the police did at the time of arrest. Sukma also alleged that he was inhumanly treated and belittled by the police in the car when he was

brought to Bukit Aman after the arrest where ASP Rodwan played loudly a cassette tape containing speeches of Dato' Seri Anwar and hurled abusive and insulting words against Dato' Seri Anwar. I agree with the prosecution when they say that ASP Rodwan has no plausible reasons whatsoever to abuse or insult Dato' Seri Anwar as he would gain nothing by doing so. It is preposterous for an officer to say such things against Dato' Seri Anwar who was a Minister of the crown. Even assuming the allegation was true, I do not see in what way this would affect the mind of Sukma when he made the confession about twelve days later on 17 September 1998. The embarrassment and humiliation, if there was any, would have disappeared from his mind with the passage of time.

Sukma also alleged that he was confined to a cell in the lock-up which was damp; smelly and dirty. A visit to the cell was made at the request of the defence counsel. I am more than satisfied that the cell was clean and dry and not smelly at all. It is fit for human habitation, not of course comparable to a five star hotel.

He further alleged that he was only in his underwear on the night of 6 September 1998. The evidence does not support this allegation. It is in evidence that before he was placed in cell number 8 that evening, he was asked to remove his shirt and trousers by Cpl. Shamsudin (TRW8) for the purpose of examining whether there was any injuries on his body in accordance with the procedure laid down under r. 7 of the Lock Up Rules 1953. After the examination by TRW8 Sukma was allowed to put on his dress again. It is therefore not true that he was only in his underwear the whole night. He was also given a blanket (see entry 4094 in Lock Up Register).

The other allegations are in respect of the manner how the interrogation was conducted. Sukma said that the interrogation was carried out in a rough manner which amounts to threat or oppression. He alleged that:

(a) during the interrogation he was asked to strip naked and to go round in circles while being handcuffed: The evidence given by Sampornak shows that Sukma was asked to undress only on the first day at the interrogation to see whether there were injuries on his body and after three or four minutes he was allowed to dress up and the handcuff was removed. This allegation has no merit.

(b) The interrogation team members hurled abuses at him simultaneously and repeatedly very close to his ears.

(c) The chair on which he sat during the interrogation process was kicked and he fell down.

(d) His spectacles was removed and was slammed on the table and thrown on to the floor. There is no evidence that his spectacle was broken or smashed to support the allegation that it was slammed or thrown on the floor. This allegation is a mere figment of his imagination without any truth whatsoever.

(e) He was humiliated when he was examined by Dr. Zahari Noon (TDW5) on 9 September 1998, in the presence of a lady when he was stripped naked and photographs were taken in the nude. The examination according to Dr. Zahari entails the examination of his private parts etc and the clothes had to be removed. Photographs were taken for purposes of record and as evidence and not for other sinister purposes. The photographs were taken with Sukma's permission. It is not true that the examination was carried out in the presence of a lady. The evidence is that the lady referred to is DSP Chong, a police officer who left the room before the medical examination commenced. There was no truth that the lady officer was present when he was examined by Dr. Zahari. There was no humiliation at all in the circumstances and this allegation is devoid of merit.

(f) he alleged that he was programmed like a computer and drilled (to use the learned defence counsel's words) to make him submit to the wishes of the police. On this allegation there is not an iota of evidence to show how, when, by whom and where he was programmed and drilled. In fact in evidence ASP Rodwan denied this allegation.

(g) It was alleged that he was subjected to long hours of interrogation for about eight hours daily for a period of ten days. The evidence from the prosecution witnesses and the various entries in the Lock-up Register show that Sukma was interrogated between 8.00/8.30am to 12.30pm in the morning session and between 2.30pm to 4.30pm in the afternoon session. He would be returned to his cell by 4.30pm and at times just before 6pm which is permissible under the lock-up rules. The interrogation was carried out within the permissible time limit under the lock-up rules. There is no evidence to show that Sukma was interrogated at odd hours until late in the night. It has been held that long hours and odd hours of interrogation would appear to be suggestive of oppression: (See *Dato' Mokhtar bin Hashim v. PP*).

In *PP v. Kamde bin Raspani* [1988] 1 CLJ 644 it was held that 17 1/2 hours of interrogation until early hours of the morning and carried out after 6.30pm constituted oppression as this would breach the lock-up rules. However, even in cases where these is a breach of the lock-up rules there may be circumstances attending the breach which do not amount to

oppression making the confession admissible (*Public Prosecutor v. Veeran Kutty & Anor* [1990] 2 CLJ 673. In the instant case, I am satisfied that the interrogation was not carried out at odd hours in contravention of the lock-up rules so as to render the confession inadmissible on the ground of oppression.

(h) It was also alleged that he was not given food. This cannot be true as the evidence shows that throughout the period of detention he was given food during lunch break and at dinner. He was not given food at dinner time only on the 6 September 1998 ie, the day of his arrest. This is not disputed by the prosecution as the time for serving food was over. In any event, there is no evidence to show that Sukma was hungry for he could have asked for some food if it was true that he was hungry. He did not complain about food on other days and this fact enhances the truth that he was provided with food except for the first night after his detention. It is also in evidence that the interrogation was adjourned during lunch time. I am of the view the fact that he was not given food on the night of 6 September 1998 would not in any way have sapped his will to resist or so undermined him physically or mentally when he gave his confession on 17 September 1998 ie, 10 days later. Sukma is a young man. He appears to be physically fit but for his complaint that he is asthmatic, there is no evidence to show that his asthmatic condition was at a stage which affects his physical well being. This is obvious as he never complained during his detention that he suffered from any asthmatic attack and at no time was he attended to by a doctor for treatment of asthmatic attack during his detention. To my mind this evidence also serves to show that his interrogation was not carried out in a harsh and inhuman manner and he was treated well while under detention and while undergoing interrogation, otherwise he would have collapsed. Under these circumstance and for the above reasons, I find that there were no elements of oppressions, promise, threat and inducement or the use of other unlawful means that would render the confession inadmissible.

Having considered all the evidence adduced in the trial within the trial and the submission of counsels both for the prosecution and in all the circumstances, I was satisfied that there were no grounds sufficient to persuade me in the exercise of my discretion that I should exclude the confession as evidence. I therefore admitted in evidence the confession made by Sukma on the ground that the prosecution had proved beyond reasonable doubt that it was made voluntarily in the sense that it was not obtained by threat, inducement, promise or oppression. The confession was marked as exh. P4.

**Applications Made Orally In The Course Of Proceedings**

Before considering the submission of the parties at the end of the case for the prosecution, it is appropriate at this stage to deal briefly some of the applications made by the defence counsel, to complete the record of this proceedings.

(a) The application to disqualify me to continue with the hearing of this case.

On 27 September 1999, Encik Karpal Singh applied orally for an order that I should not continue with the hearing with this case. The ground for the application is that there is a real danger or reasonable apprehension or suspicion that I may be biased and not actual bias.

The facts relied upon by Encik Karpal Singh that occasion the making of the application are that before my elevation as a judge, I was a share holder and a director in Dataprep Holdings Sdn. Bhd. Mirzan Mahathir, a son of the Prime Minister was also a shareholder and director of the company. The appointment of a judge in this country is made by the King on the advice of the Prime Minister. It was submitted that the person responsible for putting into effect the prosecution of Dato' Seri Anwar from the charges framed is in fact under the circumstances prevailing here by the Prime Minister.

As I had business connection with the Prime Minister's son, it was contended that I should have disclosed this fact before the commencement of this case. It was submitted that the mere fact of my interest in the company is sufficient to disqualify me unless I had made sufficient disclosures. The learned counsel relied on *R v. Bow Street Metropolitan Magistrate and Ors; Ex parte Pinochet Ugarte (No. 2)* [1999] 1 All ER 577 for his proposition. With the greatest respect, I see no logic in making the application. What is the relevance of my past association with the Prime Minister's son in Datapret Holdings Sdn. Bhd. in this proceedings? The company is not a party in this trial and neither is the Prime Minister's son. The principle in *Pinochet*'s case does not apply.

The real danger and reasonable apprehension and suspicion that I may be biased as alleged although it is not alleged I am biased is a mere allegations by the counsel without any basis. It is raised for the purpose to embarrass me and for no apparent reasons and to delay this proceedings. I dismissed the application as being one without any merit whatsoever.

(b) Application to show cause against various persons for commenting and making references to the trial

There was an application made by the Attorney-General for an order to issue a notice to show cause against Dr. Chandra Muzaffar to direct him to appear in court to explain why he should not be charged for contempt of court based on an article commenting on the order of this court on the admission of Sukma's confession alleged to be written by him in the internet.

I found that the Attorney-General has not proved the authenticity of the article alleged to be written by Dr. Muzaffar. I suggested to the Attorney-General to institute proper proceedings for contempt if he so desires.

Encik Karpal Singh on numerous occasions also made application orally to cite the Prime Minister and other political figures for contempt of court.

I ruled that the court would not entertain oral applications to cite people for contempt. If any persons are aggrieved by any comments or references made by anybody in connection with the trial of Dato' Seri Anwar, he or she should institute proper proceedings for contempt of court. I made a ruling that oral applications would not be entertained.

**Submission At The End Of The Prosecution Case**

The prosecution closed its case after calling nine witnesses on whose evidence the prosecution relies to prove its case against both the accused. At the end of the prosecution case both parties submitted. I shall now deal with the submission of the parties.

*(a) Azizan's Explanation In The Impeachment Proceedings*

En. Fernando again raised the issue of Azizan's impeachment and advanced forcefully the argument that Azizan was not asked to explain the second statement which is "selepas bulan September 1992 sehingga sekarang tertuduh tidak meliwat saya." It was contended that Azizan did not give an explanation on this statement and the court has not considered it in making a ruling that Azizan's credit is not impeached. I have no hesitation to say that this argument is without any merit. I have considered carefully the explanation given by Azizan earlier in this judgment when I discussed the issue of the impeachment of Azizan. I accepted his explanation for the reasons stated therein and ruled that his credit is saved. I need say no more on this as this is mere repetition.

*(b) The Standard Of Proof On The Prosecution At The Close Of Its Case*

The standard of proof required of the prosecution at the end of its case under the law as it stands today is governed by s. 180 of the Criminal Procedure Code which reads as follows:

> 180 (1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (2) If the court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal.
>
> (3) If the court finds that a *prima facie* has been made out against the accused on the offence charged the court shall call upon the accused to enter his defence.

This section was introduced by the amendment to the Criminal Procedure Code by the Criminal Procedure Code (Amendment) Act 1997 (Act A979) which came about after the decision by the Federal Court in *Arulpragasan a/l Sandaraju v. PP* [1996] 4 CLJ 597. This amended section would apply only to an act or ommission constituting a criminal offence committed on or after 31 January 1997. In *Dalip Bhagwan Singh v. Public Prosecut*or [1997] 4 CLJ 645 Peh Swee Chin FCJ (delivering the judgment of the Federal Court) explained the effect of the amendment as follows:

> The said amendment would apply in our view, only to an act or omission constituting a criminal offence committed on or after 31 January 1997, and not to any such act or omission before 31 January 1997. For such act or omission committed before January 1997, the test laid down in *Arulpragasan*'s case, ie, that of proof beyond a reasonable doubt at the close of the prosecution's case, would still apply because the amendment is not couched in terms, either expressly or by necessary implication which would make it retrospective in operation (see also *Bahruni bin Ismail v. PP* [1997] 3 CLJ 267).

It is therefore clear on the above authorities that the standard of proof required of the prosecution at the end of its case in the instant case before me is proof beyond a reasonable doubt on the charges against both accused as the alleged offences committed by the accused were between the month of January to March 1993. The test laid down in *Arulpragasan*'s case referred to in *Dalip Singh*'s case was enunciated in *Arulpragasan a/l Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597 at p. 613 by Eusoff Chin CJ which reads as follows:

> It is trite law that the onus is on the prosecution throughout the case in any criminal trial to prove the charge against the accused beyond a reasonable doubt. In my view the same standard of proof applies at the intermediate stage of the trial ie, at the close of the prosecution.

Both the prosecution and the defence are in agreement that the standard of proof required of the prosecution is proof beyond a reasonable doubt at the end of its case.

What then is the meaning of "beyond a reasonable doubt"?

In *Liew Kaling & Ors. v. Public Prosecutor* [1960] 26 MLJ 306 at 311 Thomson CJ referred to *Miller v. Minister of Pensions* [1947] 2 All ER 372 where Denning J (as he then was) described the degree of proof required in criminal cases as follows:

> That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

The prosecution is said to have discharged its burden of proof beyond reasonable doubt if on the evidence at the end of the prosecution case the accused elects to remain silent the court must convict (see *Arulpragasan*'s case). The court must be satisfied that every ingredient of the charge has been proved beyond reasonable doubt.

*(c) Amendment Of The Charges*

As stated earlier in this judgement the charges against both accused were amended at the commencement of this trial. The defence took strong objection to the amendment of the charges. Both accused applied to strike out the proceedings on the ground that the amendment was not made in good faith and was an abuse of the process of the court and therefore prejudicial and oppressive to the accused. It is in evidence which is not disputed that the charges against both accused were amended twice by the prosecution. The original charge against Dato' Seri Anwar stated that the offence was alleged to be committed in May 1994. This charge was amended first on 27 April 1999 in respect of the date of the commission of the offence which is from May 1994 to May 1992. The second time the charge was amended on 7 June 1999 at the commencement of this trial. The amendment was in respect of the date mentioned in the amended charge ie, from May 1992 to between January to March 1993. The original charge against Sukma stated the date as May 1992 and this date was also amended to between the months of January to March 1993 on 7 June 1999.

I had heard the applications to strike out the proceedings in Miscellaneous Application No 44-27-99 and Miscellaneous Application No. 44-25-99. I had dismissed these applications on the ground that they were devoid of any merits. The reasons for dismissing the applications are stated in my grounds of judgment therein. There is an appeal pending against this decision. This issue on the amendment of the charges was raised again in the submission at the end of the prosecutions case. In view of the evidence adduced by the prosecution at this trial I shall briefly deal with this issue again. It is contended by the defence the charges as amended against both the accused are doomed to failure at the outset as they are false and fabricated. In support of this contention the defence submitted that the investigation officer, SAC1 Musa was never asked for the reason why the charges have to be amended and neither was Azizan, the man who would have known, asked for the reason. There was therefore according to the defence, no evidence to show why the date stated in the original charges had to be amended drastically. I agree with the submission of the prosecution that there is no requirement under the law that reasons must be given why the amendments were made. In any event the defence counsel, Mr. Fernando himself has ventured state the reasons why the date May 1992 was amended to between January to March 1993 when he submitted "we are not disputing the prosecution has the right, what we are questioning is the reason for the second amendment. I say the reason which the prosecution themselves readily admit is because the notice of alibi served upon them it was pointed out to them and they did verify that the venue mentioned in the charge the so called place ie, Tivoli Villa was still under construction. That is why, they had to amend the charge".

It is trite law that the Attorney-General, who is also the Public Prosecutor has a very wide discretion in all criminal prosecutions under the Penal Code other than proceedings before a Syariah Court, a native court or a court-martial. (see s. 376(1) of the Criminal Procedure Code and art. 145(3) of the Federal Constitution). I do not wish to deal with this point at length again at this stage as I had considered this in depth in my judgement in the applications by both accused to strike out the proceedings. Suffice for me to reiterate that the Attorney-General has exercised his discretion properly and in accordance with the law and on the evidence available in amending the charges. I shall refer to and highlight the evidence later in this judgment when I deal with the question whether the prosecution has made out a case beyond reasonable doubt against both accused. In any event I am satisfied that the defence has failed to show that the amendments were made *mala fide*. My earlier ruling that the objection to the amendments of the charges be dismissed stand.

*(d) Whether The Charges Are Vague And Weak*

It was contended by the defence that the charges against the accused are vague and lack of certainty because no specific date is mentioned therein. It was submitted that the date between the months of January to March 1993 is vague. The complaint by the defence on this point is that the accused would not be able to meet the charges.

It is a requirement under s. 153(i) of the Criminal Procedure Code that particulars must always be given which would be sufficient to give the accused notice of the matter with which he is charged. Section 153(i) of the Criminal Procedure Code states:

> The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

In this instant case it is clear that in the charges it is specified the offences were alleged to have been committed one night at about 7.45pm between the months of January and March 1993 at Tivoli Villa, in the Federal Territory of Kuala Lumpur. I am of the view that these are particulars sufficient to clothe the charges with clarity and certainty. The charges as amended are clear and unambiguous and as such both the accused have not been in any way misled by the charges as framed. Both the accused know what the charges are against them. They are not in any way prejudiced by the failure of the prosecution to state the exact date and this omission has not occasioned a miscarriage of justice. In any event a date in the charge has never been material. In *R v. Severo Dossi* [1918] 13 Cr. App. R 158 (quoted in *Law Kiat Lang v. Public Prosecutor* [1966] 1 MLJ 215 and *Ho Ming Siang v. Public Prosecutor* [1966] 1 MLJ 252) Lord Atkin J observed:

> From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.

In *Ku Lip See v. Public Prosecutor* [1982] 1 MLJ 194 the accused was convicted on a charge of rape where the charge states that the alleged offence was committed between the month of May 1978 at about 7pm and the month of June 1978 at about 7pm. The Federal Court held that the charge has nevertheless specifically defined the time and place sufficiently to enable the applicant accused to answer the charge.

On the above premises, I was therefore unable to agree with the submission advanced by the defence that on this point the prosecution has failed to prove its case beyond reasonable doubt and both the accused should not be called to enter their defence. The submission is without any merit.

*(e) Whether Azizan Is An Accomplice*

An accomplice is defined in Wharton's Law Lexicon as "a guilty associate in crime". In *Regina v. Mullins* 3 Cox CC 526 Maule J described an accomplice as a person who has concurred "fully in the criminal designs of another for a certain time, until getting alarmed or for some other cause, they turned upon their former associates and gave information against them. These persons may be truly called accomplice".

When the issue whether a witness is an accomplice is raised "the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his *actus reus*. The whole idea is completely contrary to the basic concept of criminal liability" – per Salleh Abas CJ (as he then was) in *Ng Kok Lian & Anor v. Public Prosecutor* [1983] 2 CLJ 247. In deciding whether a witness is an accomplice the court has therefore to consider the evidence that is before it. Bearing in mind this principle can it be said that Azizan is an accomplice? Does the evidence show that Azizan is an accomplice? In his evidence he said in cross-examination that he told the police he was sodomised between the months of January and March 1993 although he cannot remember the exact date on which the sodomy took place. It was contended by the prosecution that Azizan was not an accomplice because he was sodomised without his consent. He was under fear, he was scared of both the accused and was not a willing participant in the offence but a victim of it. The prosecution referred to *Srinivas Mall Bairoliya v. Emperor* [1947] AIR PC 135 in support of its contention. With the greatest respect I do not agree with this submission. The case of *Srinivas* is not an authority for the proposition that a witness is not an accomplice just because there is no consent on his part in the commission of the act that forms the subject matter of the charge against the accused. The case laid down the principle that when an accomplice acts under a form of pressure which it would require some firmness to resist reliance can be placed on his uncorroborated evidence. In the instant case the evidence shows that Azizan was invited to visit Tivoli Villa by Sukma. Azizan went there to see Sukma's new apartment. He went there not with the intention of committing sodomy with both the accused. His *actus reus* alone is not sufficient to make him an accomplice, there must also be the intention on his part (see *Ng Kok Lian*'s case). For the reasons I therefore find that Azizan is not an accomplice.

*(f) Credibility Of Azizan*

After failing in the application to impeach Azizan based on the alleged contradictions between statements he made at an earlier trial of Dato' Seri Anwar and his evidence given in this trial the defence vigorously challenged the evidence of Azizan bin Abu Bakar. The defence is entitled to embark on the assault of the credibility of Azizan based on the facts of the case even after a ruling has been made by the court that his credit is saved. The effect of refusing an application to impeach is set out in the book *Impeachment Proceedings* by S. Augustine Paul at p. 79 as follows:

> Primarily the effect is that the previous inconsistent statement will no longer place the witness credit in any jeopardy as he has satisfactorily accounted for it. His credit would stand to be assessed on the same basis as that of any other ordinary witness and would depend on the facts of the case.
>
> In *Tan Gong Wai*'s case after refusing an application to impeach the credit of a witness the learned trial judge decided to accept part of his evidence after considering the whole of the evidence and his inconsistent testimony in court. However, on appeal the Supreme Court held him to be an unreliable witness (see *Tan Gong Wai v. PP* [1986] 2 MLJ 206). This shows that on the facts of a particular case a witness evidence can be considered as totally worthless even if his credit has been saved.

The challenge by the defence on the evidence of Azizan is on the principal ground that he is an unreliable witness and is not a witness of truth because he gave inconsistent statements in his testimony. It was submitted that his evidence is far from convincing as there are material contradictions in his testimony. The defence counsel, En. Jagdeep Singh Deo for Sukma argued that the fact that I allowed impeachment proceedings be brought against Azizan in relation to his testimony in this proceeding as compared to his testimony in the earlier trial of Dato' Seri Anwar is acknowledgment of the fact that there are material contradictions in his testimony and this by itself is a ground for disbelieving Azizan and rejecting his evidence. With due respect such an argument cannot be accepted because the mere fact of allowing the impeachment proceeding to be brought does not automatically mean that the witness is an unreliable and untruthful witness and his evidence be rejected. The application to impeach was allowed to enable the witness to explain the discrepancies. It is the finding of the court at the end of the impeachment proceeding whether the witness has explained the material discrepancies that is important. I have already dealt with the impeachment proceeding and had made a ruling that Azizan's credit is saved after having considered all the evidence adduced at the end of the prosecution case and the facts and circumstances of this case bearing

in mind the principle on which the court is guided in assessing the credit of a witness as stated in *Dato' Mokhtar bin Hashim &. Anor. v. Public Prosecutor* [1983] 2 MLJ 232, which is "when a witness's credit is sought to be impugned his credit stands to be assessed as a whole with the rest of the evidence at the appropriate stage, that is to say at the close of the case for the prosecution or for the defence as the case may be. No immediate order of a summary nature can or should be made ... and the right of cross-examination or re-examination according to the circumstances should not be denied as it might well be that in the exercise of such right his credit might be repaired, restored or re-establish." – per Eusoffe Abdoolcader FJ. After considering the evidence as a whole at the end of the case for the prosecution I accepted the explanation of Azizan on the apparent material contradictions. For the reasons stated I reject the argument that by allowing the application to impeach Azizan the court has accepted the fact that there are material contradictions in Azizan's testimony and his evidence should be rejected.

The next instance of discrepancies and contradictions in Azizan's testimony alleged by the defence is in respect of Azizan's evidence in relation to the date when the alleged offences were committed as stated in the charges against the accused in the instant proceeding. It was submitted by the defence that Azizan was not truthful when he testified concerning the dates on which the offences were committed. According to the defence counsel, it was SAC1 Musa, the Chief Investigation Officer in this case who had asked Azizan to change the date. In cross-examination in answer to the question "Who ask you to change the date from May 1992 to January to March 1993?" Azizan said it was SAC1 Musa who asked him to change the date. It was therefore submitted that Azizan lied on this issue. In this regard the notes of evidence read as follows:

| | |
|---|---|
| Question: | Adakah awak beritahu pihak polis awak diliwat di antara bulan Januari hingga Mac 1993? |
| Answer: | Ada. |
| Question: | Adakah tarikh Januari hingga Mac 1993 kamu beri kepada polis? |
| Answer: | Ada. |
| Question: | Apa pihak polis soal awak berkenaan tarikh yang disebut di dalam charge Januari-Mac 1993? |
| Answer: | Polis suruh saya ingat dengan jelas. |

Later Azizan was asked again about the date January to March 1993 though in different words as follows:

Question: Adakah kamu disuruh pinda tarikh itu kepada Januari hingga Mac 1993?

Answer: Ya.

Question: Bila dan siapa suruh awak buat demikian?

Answer: Pegawai polis yang merakamkan statement saya.

Question: Dan kamu setuju dengan dia?

Answer: Ya.

Question: Siapa pegawai itu?

Answer: SAC1 Musa.

Question: Pada 1/6/99 dia suruh awak pinda tarikh itu?

Answer: Ya.

He was also cross-examined by Encik Gobind Singh, the learned counsel for Sukma, on the same issue as follows:

Question: Kamu terima cadangan SAC1 Musa berkenaan tarikh liwat dilakukan?

Answer: Saya yang memberitahu SAC1 Musa tarikh tersebut dan SAC1 Musa tidak mencadangkan tarikh itu kepada saya.

Question: Adakah SAC1 Musa suruh kamu menentukan tarikh-tarikh tersebut?

Answer: Ya. Sebelum beliau merekodkan dan menyuruh saya mengingatkan dengan betul tarikh yang saya berikan kepadanya untuk direkodkan di dalam statement saya.

In re-examination Azizan said that it was he who informed SAC1 Musa he was sodomised between January to March 1993. He was asked to explain what he meant when he said in cross-examination it was SAC1 Musa who asked him to change the date. His explanation is as follows:

> SAC1 Musa telah meminta saya untuk mengingati dengan jelas tentang kejadian pertama kali saya diliwat di Tivoli Villa. Saya mengatakan kepadanya tarikh yang tepat saya tidak pasti tetapi ianya berlaku selepas 4 atau 5 bulan saya berhenti kerja sebagai pemandu kepada Datin Seri Wan Azizah, iaitu pada bulan September 1992 dan saya memberitahunya bahawa kejadian tersebut adalah di antara bulan Januari hingga Mac 1993 lebih kurang pukul 7.30 malam.

It can be gathered from his explanation that what he meant by saying that it was SAC1 Musa who asked him to change the date was that SAC1 Musa asked him to remember the date clearly with regard to the incident that took place at Tivoli Villa for the first time.

SAC1 Musa in his testimony said he sent for Azizan to see him at Bukit Aman on 1 June 1999. Azizan came at about 1.30pm. He asked Azizan to recollect the date when Azizan was sodomised by Dato' Seri Anwar and Sukma for the first time at Tivoli Villa. Azizan informed him that the first time he was sodomised by Dato' Seri Anwar and Sukma at Tivoli Villa was between January and March 1993. He recorded a statement from Azizan on the same day. This evidence corroborates what Azizan had said that it was he who told SAC1 Musa of the date ie, between January and March 1993 as stated in the charges against both the accused. I accept the evidence of SAC1 Musa on this issue as I find there is no reason why he should ask Azizan to change the date. He was only carrying out his duties as an Investigation Officer. He felt that there is a likelihood the date stated in the charge may not be accurate after carrying out further investigations on receipt of the notice of alibi. It is clear on the evidence adduced and under the circumstances of the case Azizan was not asked by SAC1 Musa to change the date. I am convinced that it was Azizan who told SAC1 Musa that he was sodomised by both the accused between January and March 1993 at Tivoli Villa. I find as a fact that Azizan was telling the truth.

It is also contended that Azizan is not reliable as he had contradicted himself in cross-examination when he was asked about the months of May 1994 and 1992. A close scrutiny of the evidence would reveal that he was asked repeatedly in cross-examination whether he told the police he was sodomised in May 1994 and May 1992. It must be noted that the former date was stated in the original charge and was later amended to read May 1992 and finally amended to between the months of January to March 1993. On 3 August 1999 he was asked:

Question: Adakah awak beritahu pihak polis kamu diliwat pada bulan Mei 1994?

Answer: Saya tidak ingat.

This question was repeated and his answer remained the same "saya tidak ingat". On 9 August 1999 that is six days later he was asked again about the year 1994 as follows:

Question: Adakah awak beritahu pihak polis kamu diliwat oleh Dato' Seri Anwar dan bukan dalam tahun 1994?

Answer: Ada.

Question: Adakah tidak sebelum hari ini awak ada memberitahu mahkamah ini bahawa awak tidak ada memberitahu polis bahawa awak diliwat oleh Dato' Seri Anwar dan Sukma pada tahun 1994?

Answer: Ada.

As regards the date May 1992 he was asked on 3 August 1999 as follows:

Question: Adakah awak beritahu pihak polis awak diliwat dalam bulan Mei 1992 oleh Dato' Seri Anwar dan Sukma?

Answer: Tidak.

Question: Benar atau tidak awak tidak beritahu polis tarikh tersebut?

Answer: Ya, benar.

Later he was again asked about May 1992 in the following manner:

Question: Kamu tahu atau tidak kamu memberi keterangan di dalam perbicaraan yang lepas bahawa selepas Mei 1992 kamu tidak diliwat oleh tertuduh sehingga hari ini?

Answer: Benar.

Question: Saya berkata kepada awak tuduhan dipinda dari Mei 1994 kepada Mei 1992 selepas kamu beri keterangan sedemikian.

Answer: Saya tidak tahu.

Question: Katakan kepada kamu tuduhan asal terpaksa dipinda ke Mei 1992.

Answer: Tidak tahu.

Question: Dua hari sudah awak kata awak tahu tarikh dipinda tetapi hari ini awak kata tidak.

Answer: Kerana soalan ditanya berkali-kali berkenaan tahun 1992 dan 1994 dan saya terkeliru.

It is to be observed that May 1994 and May 1992 are not the months we are concerned with in the instant charges against both the accused. These months are relevant only in respect of the earlier charges which have been amended. We are not concerned with these charges. I had dealt with the amendment of these charges earlier in this judgment and had ruled that the amendment was lawfully made in the proper exercise of the discretion by the Attorney-General. In his testimony Azizan said he was confused because he was asked about the months of May 1994 and May 1992 repeatedly as stated above. I find as a fact that he was confused. When a witness is confused, it does not mean he was lying. The naked truth is that he could not remember what he had said. I am satisfied he was not lying. In any event, the issue whether he told the police he was sodomised in May 1994 and May 1992 are not the issues in the current charges against both the accused. The issue is whether he was sodomised by both the accused between the months of January and March 1993 at Tivoli Villa. I therefore rule the credit of Azizan is not affected on this score.

It was also argued that the evidence of Azizan cannot be accepted in the light of the evidence of SAC1 Musa. It was pointed out that SAC1 Musa in his evidence said five statements were recorded from Azizan and that all these statements were in relation to sodomy. The allegations are consistent and true. He also testified that there was a necessity to amend the charges because there were contradictions in the date. It was submitted that there were two versions of the prosecution case on a fundamental ingredient ie, the dates. In this respect, it is necessary to recapitulate what Azizan had said about the dates. In his evidence which I had referred to earlier he was confused about the dates as he was asked repeatedly the same questions on the dates May 1994 and May 1992. In substance what he said on this issue was that he could not remember whether he told the police he was sodomised in May 1994 although he did say that he did not inform the police that he was sodomised in 1992.

Be that as it may, the evidence of SAC1 Musa clearly states that Azizan was consistent in his statements on the issue of sodomy although he was not sure of the exact dates. The relevant dates we are concerned with in the present charges are between the months of January and March 1993. Azizan emphatically said in evidence that he was sodomised by both Dato' Seri Anwar and Sukma at Tivoli Villa between these dates and he gave the reasons for remembering the dates. This evidence was not successfully challenged. It is therefore established on this evidence that Azizan was sodomised by both Dato' Seri Anwar and Sukma in Tivoli Villa between January to March 1993. Whether he was sodomised in May 1994 or May 1992 is not relevant as these dates are not in issue to be decided in this case. I see no merits on this contention and the credit of Azizan is not affected on this ground.

The other ground advanced by the defence for attacking the credibility of Azizan is his conviction in the Mahkamah Rendah Syariah Alor Gajah, Melaka. It was contended by the defence that it was necessary to recall Azizan to give evidence to confirm his conviction and to assess his credibility. An application was therefore made under s. 425 of the Criminal Procedure Code. This section is very familiar but for convenience, it is reproduced which is as follows:

> Any court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

It was argued by the defence counsels that it is essential and necessary to recall Azizan to give evidence which is essential to the just decision of the case. It has been decided in many cases that the court would allow a witness already examined to be recalled and re-examined at any stage of any enquiry, trial or other proceeding if it is satisfied that the evidence to be summoned would appear to the court to be essential to a just decision of the case (see *PP v. Phon Nam* [1989] 1 CLJ 6, *Jacob v. PP* [1949] 15 MLJ 70). The fresh evidence to be adduced must also relate to the substance of the charge in order to assist the court to arrive at a just decision of the case (see *Ramli bin Kecik* [1986] 2 MLJ 53.

The question to be decided is whether it was necessary to recall Azizan to be re-examined on what had transpired at the hearing in the Syariah Court. To answer this question the court has to consider whether the court should exercise its discretion to recall Azizan under the circumstances prevalent in this case. I am of the view that it is futile for this court to make an order to recall Azizan because to allow such an application it would amount to opening up the case against Azizan which has been decided by the Syariah Court. This court cannot and should not do that as Azizan was lawfully tried before a forum properly constituted under an Enactment enforceable in the State of Melaka. Further more the evidence recorded as in M10 does not relate to the substance of the charges on which both Dato' Seri Anwar and Sukma are being tried in the instant case. The charges against Azizan in the Syariah Court has no bearing and connection at all with the current charges faced by Dato' Seri Anwar and Sukma. I am of the view that the evidence to be adduced by recalling Azizan will not assist this court to arrive at a just decision of this current case before this court. If at all the evidence is to be referred by this court, it is only for the purpose of considering the credibility of Azizan. Even then I am of the view that the evidence will not assist this court to assess the credibility of Azizan. I shall consider this issue later. I therefore dismissed the application to recall Azizan for the reason that his evidence will not assist the court to arrive at a just decision of this case. For the same reasons I also disallow the application to call the co-accused in the Syariah Court trial.

At the request of En. Karpal Singh, one of the counsels for Dato' Seri Anwar Ibrahim, and with the consent of the prosecution, the record of proceedings in the Mahkamah Rendah Syariah Alor Gajah, Melaka was produced through the Pembantu Penolong Pendaftar Mahkamah Rendah Syariah Alor Gajah and was marked as exh. M10. The Pembantu Penolong Pendaftar was called to produce M10 under s. 139 of the Evidence Act. It cannot be denied that from the record, it is clear that Azizan admitted that

he committed the offences and he pleaded guilty at the hearing of the case on 28 September 1999. He was accordingly convicted on two charges of close proximity (khalwat) ("the first charge") and attempting to commit sexual intercourse (cuba melakukan persetubuhan haram) ("the second charge") under s. 53(1) and s. 52 respectively of the Enakmen Kesalahan Syariah Negeri Melaka 1991. He was fined RM2,500 in default six months imprisonment on the first charge and RM4,500 in default 12 months imprisonment and also to a sentence of imprisonment for a term of three months on the second charge.

I shall now consider whether the evidence adduced in the Syariah Court as recorded in M10 will assist this court to assess the credibility of Azizan. It was submitted by the defence counsel that this court has to take into account the evidence adduced in the Syariah Court to assess the credibility of Azizan. This is because Azizan in his evidence in this court has testified that he raised the allegation that he was sodomised by Dato' Seri Anwar and Sukma about five years after the alleged incident has taken place because of religion and honour (demi kepentingan Ugama dan maruah). It was submitted by the defence counsel this claim by Azizan portrays that he is a religious person and a person with high morals. It was contended that his convictions in the Syariah Court and the circumstances which went with it completely destroys his credibility to be attached to the evidence he gave in this instant trial. It was submitted that he is a witness not to be believed because under the Syariah law he does not measure up as a witness and his evidence should be rejected. Encik Karpal Singh referred to certain provision in the Enakmen Keterangan Mahkamah Syariah 1994 (Melaka Enakmen No. 12 Tahun 1994) and the Syariah Court Evidence (Federal Territories) Act 1997 (Act 561) pertaining to competency of a Muslim as a witness. It is provided under these legislations that for a Muslim to qualify as a witness he must satisfy certain stringent rules such as he must be adil, aqil and baligh. A Muslim is deemed to be adil if he carried out his religious obligations, performs the prescribed religious duties, abstains from committing capital sins and is not perpetually committing minor sins – (see the Explanation to s. 83 in Act 561). This guideline is applicable in a trial before the Syariah Court and not in a trial before this court where the provisions of the Evidence Act 1950 apply in respect of witnesses and the weight to be attached to the evidence adduced through the witnesses. In practice as far as the witnesses are concerned, it is left to the presiding judge who hears and sees the witness to attach to the evidence the weight it deserves based on the demeanour of the witnesses when giving evidence and the manner in which they answer questions during the trial. So in the instant case the credibility of Azizan is to be assessed when Azizan gave evidence before this court.

What transpired in the Syariah Court would not be relevant in assessing the credibility of Azizan. It has been held that a conviction of a witness for an offence is not a ground for disbelieving a witness (see *Gipp v. R* [1998] 155 ALR 15 – High Court of Australia). It follows therefore the mere fact that Azizan was convicted in the Syariah Court under the Syariah law is no ground for discrediting his evidence given in the instant trial and to disbelieve him.

For the reasons I have stated above, I hold that the conviction of Azizan in the Syariah Court does not affect his credibility.

To summarise my judgment on the issue of the credibility of Azizan, it is my firm finding in relation to the charges against both accused that he is a wholly reliable, credible and truthful witness taking into consideration the whole of his evidence not withstanding inconsistencies, discrepancies and contradictions which did not detract the weight and truth of his evidence in relation to the ingredients of the charges against both accused.

Azizan has truthfully and without embellishment, distortion or exaggeration in his evidence narrated in minute detail how he was sodomised by Dato' Seri Anwar and Sukma at the date and place as stated in the charges against both accused. Azizan in his evidence gave so much graphic detail of the preliminaries, and a vivid description how both accused penetrated his anus with their respective penises. His description and direct experience of being sodomised completely negatives any probability that Azizan was tutored or coached as claimed by the defence counsel. No reasonable person or judge could on the evidence come to any other finding than the firm and inescapable conclusion that both accused sodomised Azizan gaily whetting their appetites at Tivoli Villa. Only persons directly and actively subjected to these acts of sodomy would be able to narrate the details of the whole episode.

I am of the firm view that Azizan was speaking the whole truth when he said in evidence that he was sodomised at Tivoli Villa between the months of January and March 1993 by both accused as stated in the charge. There is no reason why he should come out with such meticulous details describing the preliminaries sex play indulged in by Dato' Seri Anwar unless this was true. He has nothing to gain whatsoever but stood to lose everything if his evidence was not true as this would affect his self respect and his good name and standing in the eyes of the public and would also bring embarrassment to his family members. Further one cannot conceive that one would fabricate a serious charge of sodomy against the Minister of Finance and Deputy Prime Minister of Malaysia.

It cannot be denied that there are discrepancies in Azizan's testimony. I have considered these discrepancies earlier and had made my finding on them. Apart from that, I do not find any serious discrepancies that would affect Azizan's credibility or reliability as a witness of truth on the ingredients of the charges against both the accused.

It has been held that discrepancies may be found in any case but the question is whether that discrepancies are sufficient to affect or destroy the credibility of a witness. On this point it is useful to refer to *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No. 2)* [1977] 1 MLJ 15 where Raja Azlan Shah FJ (as His Highness then was) said at p. 19 as follows:

> In this case different witnesses have testified to different parts of what had happened or what had been said and also there are, in the evidence of the witnesses for the prosecution, some discrepancies, as would be expected of witnesses giving their recollections of a series of events that took place in 1971-1973. In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other.

In an earlier case of *Chean Siong Guat v. Public Prosecutor* [1969] 2 MLJ 63 Abdul Hamid J (as he then was) opined that "Discrepancies may, in my view, be found in any case for the simple reason that no two persons can describe the same thing in exactly the same way ... If, after considering the discrepancies, if the magistrate finds that the discrepancies do not detract from the value of the testimony of the witness or witnesses, it would then be proper for him to regard the discrepancies as trivial and ignore them. On the other hand, if a magistrate finds that the discrepancies relate to a material point which would seriously affect the value of the testimony of the witness or witnesses, then it would be his duty to weigh the evidence carefully in arriving at the truth."

Bearing in mind the above principles and taking into account the credible manner in which he gave evidence, his demeanour while giving evidence and his unchallenged and unshaken evidence on the details of sodomy committed at Tivoli Villa which is consistent with itself and the other evidence adduced by the prosecution, I have no hesitation in coming to the conclusion and a finding that Azizan's evidence is wholly credible on all the facts relating to the act of sodomy committed on him by both the accused.

*(g) The Confession Of Sukma*

The prosecution sought to admit a confession made by Sukma which was recorded on 17 September 1998 by En. Abdul Karim bin Abdul Jalil, a Sessions Court judge (formerly known as President of the Sessions Court) in his capacity as a magistrate. I had made a ruling that the confession is admissible in evidence as being one which was made voluntarily after a lengthy hearing at a trial-within-a trial which was conducted to determine the voluntariness or otherwise of the confession. This ruling settles the question of its admissibility of P4 but not its truth. My detailed reasonings are contained in my ruling which I had made earlier in this judgment at the end of the trial-within-a trial. The confession was marked as exh. P4.

To start with it is important and necessary to refer and to be acquainted with the contents of the confession to get a clear perspective of the central issues revolving around the said confession. The confession (P4) starts with Sukma's background. He said he came from Indonesia to study in Kuala Lumpur. He stayed with Datuk Ibrahim and his wife at No. 27, Jalan SS 1/43, Petaling Jaya. Datuk Ibrahim was his guardian. He shared a room with Dato' Seri Anwar. He started a homosexual relationship with Dato' Seri Anwar since 1976 or 1977 although he cannot remember the exact date. He said:

> Selepas setahun hubungan kami semakin intim dan bermulalah hubungan oral seks saya melakukan terhadap dia. Selepas setahun kemudiannya dia ada melakukan liwat terhadap saya dengan menggunakan baby cream. Dia melakukan berselang-seli di antara onani, liwat dan oral.

He further said in the confession (P4) that the homosexual activities between him and Dato' Seri Anwar continued after the latter got married once or twice a month. These activities took place at Dato' Seri Anwar's residence at Subang Jaya, Seksyen 14, Petaling Jaya and at No. 8, Jalan Setia Murni 1, Damansara. He also said that homosexual activities took place between him, Dato' Seri Anwar and one Ismail who he had introduced to Dato' Seri Anwar. In the confession, Sukma also described the incident of liwat that took place at Tivoli Villa which is the subject matter of the charges against Dato' Seri Anwar and himself in this instant trial. This portion of the confession is important and is reproduced below:

> Dalam lebih kurang dua atau tiga tahun yang lalu waktu dan tahun yang tepat saya tidak ingat saya pernah membawa Datuk Seri Anwar Ibrahim ke rumah saya untuk bertemu dengan Azizan (pemandu kereta Datin Seri) di rumah saya atas permintaan Datuk Seri Anwar Ibrahim untuk melakukan hubungan sejenis. Rumah saya ini di Tivoli Villa.

> Dianya terjadi seperti begini. Saya membuat janji kepada Azizan agar beliau datang ke Tivoli Villa pada pukul 7.30 petang. Pada pukul 7.00 petang saya menjemput Datuk Seri Anwar Ibrahim dari rumah resmi beliau ke Tivoli Villa. Kami tiba di Tivoli Villa pada 7.15 petang, kurang lebih, dan pada 7.30 petang, Azizan datang ke rumah saya dengan kenderaan beliau sendiri. Setelah kami bertiga bersama, Datuk Seri Anwar dan Azizan membuka baju masing-masing untuk mengadakan hubungan sejenis, saya ada melihat hubungan mereka berdua sekejap-sekejap. Di antara hubungan mereka ianya terjadi oral dan liwat iaitu Datuk Seri Anwar Ibrahim melakukan ke Azizan dengan menggunakan cream baby tanpa menggunakan kondom. Selepas air mani Datuk Seri Anwar keluar, Azizan mengajak saya untuk melakukan liwat terhadapnya. Tapi saya tidak mencapai ketahap maksimum. Semasa saya melakukan liwat ke atas Azizan Datuk Seri Anwar berada di bilik air. Kejadian ini berlaku tiga kali di rumah saya di Tivoli Villa tetapi kali yang ketiga saya tidak menonton atau melakukan hubungan sejenis bersama mereka. Mereka hanya melakukan berdua dan saya menunggu di luar kamar.

The part of the confession reproduced above is self-explanatory. It says clearly that Azizan was sodomised at Sukma's apartment at Tivoli Villa by both the accused. The defence contended that it cannot be true that Sukma fetched Dato' Seri Anwar from "rumah resmi beliau" to Tivoli Villa because No. 47, Jalan Damansara, Damansara, Kuala Lumpur was not the official residence of Dato' Seri Anwar in the months of January to March 1993. This contention cannot be right. A close examination of p. 13 of the confession does not show that Sukma specify the address of Dato' Seri Anwar's official residence. Azizan clearly states "rumah resmi beliau". What he meant by "rumah resmi" was Dato' Seri Anwar's house at No. 8, Jalan Setia Murni 1, Bukit Damansara, Kuala Lumpur where he referred to this house as "rumah resmi peribadi beliau" earlier in the confession at p. 10. It is also equally clear that the confession implicates not only Sukma (the maker of the confession) but also Dato' Seri Anwar who is a co-accused.

Having said that I now consider the role played by the confession in the case for the prosecution against both the accused. It is settled law that a confession if voluntarily and truthfully made is an efficacious proof of guilt. When the prosecution relies on the basis of an accused's confession for a conviction, the court must apply a double test as stated in *Shankaria v. State of Rajasthan* AIR [1978] Supreme Court 1248 at p. 1252 where it is stated:

(1) Whether the confession was perfectly voluntary?

(2) If so, whether it is true and trustworthy?

As against the maker, the confession can be used to support his conviction if the court believes it is voluntary and true. In *Dato' Mokhtar bin Hashim & Anor. v. Public Prosecutor* [1983] 2 MLJ 232 at p. 266, Hashim Yeop A. Sani J (as His Lordship then was) stated the law on this issue as follows:

> On the use of a confession as against the maker the position in law is clean. An accused can be convicted on his confession if the court believes it is voluntary and it is true.

I have already ruled that the confession was made voluntarily. It remains to be considered whether it is true and trustworthy. It is to be borne in mind that if a confession is found to be voluntary, the court must before acting upon it be satisfied what is stated therein is true and reliable. In judging the truth and reliability of the confession, the court should carefully examine the confession and compare it with the rest of the evidence in the light of the surrounding circumstances and probabilities of the case (see *Shankaria v. State of Rajasthan* AIR [1978] Supreme Court 1248).

Now it is time for me to compare the confession with the rest of the evidence. It may be recalled that Sukma did not deny he had made the confession but said that it was made under compulsion, threat and promise and under circumstances which amount to oppression. His claim in substance was that he made the confession involuntarily and that the confession is false and untrue. He said that the story he adumbrated in the confession was put into his mouth by ASP Rodwan. When asked by his counsel in examination-in-chief on the circumstances under which he made the confession he said:

> Encik Rodwan telah memberi guide kepada saya berulang-ulang kali dan sekiranya saya tersilap pun tidak mengapa yang lebih penting mesti memberi keterangan secara jelas dan detail mengenai hubungan homosexual diantara saya dengan Dato' Seri Anwar dan Azizan.

ASP Rodwan denied that he ever asked Sukma to say what he said in the confession. I believe what he said because looking at the evidence as a whole it would appear the allegation is too far fetched and unreliable to be accepted. The confession appears to be a spontaneous account in minute and vivid details about the manner of the commission of the alleged sodomy by both the accused as stated in the charges. The way the acts of sodomy committed by both accused are narrated by Sukma in the confession is a tell-tale circumstances which shows undoubtedly that only the perpetrator would be able to narrate the events in that manner. Further it is difficult to believe that ASP Rodwan coached Sukma what to say in his confession. The evidence show that ASP Rodwan spent very little time

with Sukma before the confession was recorded by Encik Abdul Karim. ASP Rodwan met him at the counter in the lock-up in the presence of others. It would be beyond comprehension that ASP Rodwan would have programmed Sukma what to say in the confession as claimed by the defence under the circumstances. There is evidence that ASP Rodwan met Sukma on other occasions but the encounter was brief to enable ASP Rodwan to coach Sukma. Further more Sukma did not say any where in his evidence in categorical terms what ASP Rodwan actually told him what to say in his confession. The failure to condescend to details of what ASP Rodwan actually said to him cuts at the root of his allegation that he was coached by ASP Rodwan what to say. In the absence of evidence to this effect, I conclude that the allegation was wholly unsubstantiated. Under these circumstances, I rule that the allegation by Sukma that ASP Rodwan "telah memberi guide kepada saya berulang-ulang kali" is without basis.

In addition, it was submitted by the defence that Sukma was programmed systematically into making the confession. I had dealt with this point earlier in this judgment. To recollect it is sufficient to say at this stage that my finding on this point was that there was no systematic programming of Sukma in making the confession. My reasons for making such a finding had been stated earlier and I therefore do not wish to repeat what I had already said on this point.

There is left the evidence of Dr. Zahari Noon (TDW5) and Dr. Abel Arumugam (SP8) to be considered in connection with the truth of the confession. Both witnesses examined Sukma for the purpose of showing whether Sukma was or was not sodomised. Their evidence would be relevant only to establish the truth of the confession with regard to the issue that he was sodomised. Even then I find the evidence of both these witnesses who were called as expert witness do not conclusively prove that Sukma was or was not sodomised. I attach no weight to this evidence as it does not help this court to decide the truth or otherwise of the confession.

It was further submitted that the confession contradicted Azizan's evidence on the dates as stated in the charges. It does not relate to the offences on which both the accused are being charged. The defence pointed out that the sodomy stated in the confession refers to incidents which took place "dalam lebih kurang dua atau tiga tahun yang lalu". This would mean according to the defence that the alleged offences could not have been committed in 1993. What Sukma said in the confession with regard to the date he was sodomised at Tivoli Villa was that he could not remember the exact year. This is what he said from the record:

> Dalam lebih kurang dua atau tiga tahun yang lalu waktu dan tahun yang tepat saya tidak ingat – page 14 second paragraph in confession (P4).

In my view, the phrase "dua atau tiga tahun yang lalu" does not conclusively establish that the. date of the commission of the offences could not be 1993. I do not agree with the contention of the defence that "dua atau tiga tahun yang lalu" would be in 1995 or 1994 because this may also include 1993. This year cannot be excluded for the simple reason that Sukma himself was not sure of the exact date but only giving an estimated date. He could have said with precision that the year was 1994 or 1995 if he was sure that what he meant by "dua atau tiga tahun yang lalu" refers to these years but he said "tahun yang tepat saya tidak ingat". This in my view does not exclude 1993.

To summarise it is my finding that, based on the evidence of Azizan and in the circumstances, what Sukma stated in the confession that he and Dato' Seri Anwar sodomised Azizan as stated in the charge is true.

In any event if there is any contradiction in any part of the confession with other evidence adduced, the court is entitled to accept part and reject part of the evidence (see *Lim Yow Choon v. PP* [1972] 1 MLJ 205). I therefore conclude that what is stated by Sukma in the confession that he was sodomised by both Dato' Seri Anwar and Sukma at 7.45pm between the months of January to March 1993 was true.

What then is the position as regards a co-accused? Can the confession be used against Dato' Seri Anwar, the co-accused in this trial?

It was submitted by the defence counsels that the confession could not be used against Dato' Seri Anwar under the circumstances of the case. This brings into focus s. 30 of the Evidence Act 1950 (Act 56 – Revised 1971) which reads as follows:

> When more persons than one are being tried jointly for the same offence, and a confession made by one of those persons affecting himself and some other of those persons is proved, the court may take into consideration the confession as against the other person as well as against the person who makes the confession.

The essential requirements for the application of this section, as can be gathered from the wordings of the section itself, are that there must be a joint trial of the persons for the same offence and the confession must be proved and it must be one affecting the maker and the co-accused. The section applies to confessions only and not to statements which do not admit the guilt of the person making the confession (see *Bhuboni Sahu v.*

*The King* – AIR [1949] PC 257 and *Herchun Singh & Ors. v. Public Prosecutor* [1969] 2 MLJ 209). The confession must also affect the co-accused.

In *Bhuboni Sahu v. The King* AIR [1949] PC 257 the Privy Council considered the application of s. 30 of the Indian Evidence Act 1872 which is similar to our s. 30 where Sir John Beaumont said that "a confession of a co-accused is obviously evidence of a very weak type ... It is not required to be given on oath, nor in the presence of the accused and it cannot be tested in cross-examination .... Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weight with the other evidence".

*Juraimi bin Husin v. Public Prosecutor* [1998] 2 CLJ 383 was referred to by the defence to show the manner in which the section must be applied. In that case the Court of Appeal was of the view that the evidence against an accused must be first marshalled, putting aside the confession of the co-accused. If the court is prepared to convict on the other evidence, it may pray in aid of the co-accused's confession to lend assurance to the conclusion of guilt already arrived at. This view is at variance from the view expressed by the Federal Court in *Herchun Singh & Ors. v. Public Prosecutor* [1969] 2 MLJ 209 where the principle of law in respect of the application of a confession of an accused person as against a co-accused was discussed and clarified. The view of the Federal Court is that the confession is used to lend assurance only in cases where the court is not prepared to act on the other evidence. The manner in which s. 30 of the Evidence Act 1950 must be applied was clarified in *Herchun Singh*'s case by H.T. Ong (CJ Malaya) at p. 210 where he said:

> In our judgment, however, the proper interpretation of section 30 is that of Bose J in Kashmira Singh, as follows:
>
> > The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether 'if it is believed' a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, 'if believed', it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

The principle enunciated in *Herchun Singh* was again emphasised and reiterated in the Federal Court in *Yap Chai Chai & Anor v. Public Prosecutor* [1973] 1 MLJ 219.

It is now timely for me to consider the other evidence adduced by the prosecution against Dato' Seri Anwar, a co-accused before taking into consideration the confession (P4) as against him. Apart from the confession there is the evidence of Azizan who testified that he was sodomised by Dato' Seri Anwar at Sukma's apartment at Tivoli Villa at about 7.30pm between January and March 1993 as stated in the charge against him. This evidence was not successfully challenged by the defence, though an attempt was made to challenge it. I accepted his evidence for the reasons which I had stated when I dealt with the issue of Azizan's credibility in the earlier part of this judgment and made a ruling that Azizan is a reliable and truthful witness. His evidence is wholly reliable and capable of belief, which I accept. It is indeed a very strong piece of independent evidence to prove that Dato' Seri Anwar committed sodomy on Azizan as stated in the charge against him. I am prepared to act on this evidence alone independently, disregarding and ignoring the confession on the principle as laid down in *Herchun Singh*'s case. It is therefore not necessary for me to call the confession in aid.

In any event an accused can be convicted solely on the basis of a confession by his co-accused, provided the evidence emanating from the confession satisfies the court beyond reasonable doubt of the accused's guilt. This is the interpretation given to s. 30 of the Singapore Evidence Act by the Court of Appeal in Singapore in *Chin Seow Noi & Ors. v. Public Prosecutor* [1994] 1 SLR 135. This new approach adopted by the Singapore Court of Appeal in interpreting s. 30 of the Singapore Evidence Act (which is similar to our s. 30) is well discussed and set out in Augustine Paul's *Evidence-Practice and Procedure*, 2nd edn at p. 294 as follows:

> The Singapore courts have now interpreted this section in a different light. In *Ramachandran a/l Suppiah & Anor v. Public Prosecutor* [1993] 2 SLR 671 the Court of Appeal had held that the section should be construed such that, as against an accused person, the confession of a co-accused could only play a supportive role and cannot by itself form the basis of a conviction. In the later case of *Chin Seow Noi & Ors v. Public Prosecutor* [1994] 1 SLR 135 the Court of Appeal said that that decision must be regarded as having been given *per incuriam* because it was given without the benefit of any argument on or analysis of issues fundamental and crucial to the proper construction of this section. It was held that the natural interpretation of this section is that it allows the conviction of an accused

to be sustained solely on the basis of a confession by his co-accused, provided the evidence emanating from the confession satisfies the court beyond reasonable doubt of the accused's guilt. It was further held that the various Indian authorities which adopted a narrower construction of a similar provision in the Indian Evidence Act must be regarded as irrelevant in Singapore, because these Indian authorities were decided within the context of a law of evidence differing in material aspects from the Singapore law of evidence. The Court of Appeal said that the judgments in the Indian cases which had hitherto been followed are replete with statements to the effect that this section should be construed narrowly because the confession of a co-accused cannot be fitted within the restricted definition of 'evidence' given in section 3 of the Indian Evidence Act which begins with 'Evidence means and includes'. The phrase 'means and includes' makes the definition both explanatory and exhaustive. This is in marked contrast to section 3 of the Singapore Evidence Act which uses the word 'includes'. This makes the definition of 'evidence' an extensive one. Thus, as Yong Pung How CJ added at page 156:

> Within the context of our Evidence Act, 'evidence' may thus be given not just the narrow statutory meaning explicitly spelt out in section 3 itself but also, where applicable, its ordinary, popular and natural meaning. In other words, the scope of admissible evidence as provided for in our Evidence Act is considerably broader than that provided for in the Indian equivalent. In contrast to the situation in India, in Singapore confessions by co-accused persons may be included in the whole body of what is understood to be 'evidence' within the parameters set by our Evidence Act.

This interpretation has now been consistently followed by the courts in Singapore. See, for example, *Abdul Rashid & Anor v. Public Prosecutor* [1994] 1 SLR 119 (CCA); *Lee Yuan Kwang & Ors v. Public Prosecutor* [1995] 2 SLR 349 (CA); *Public Prosecutor v. Rozmaan bin Jusoh & Anor* [1999] 2 SLR 181 (CA).

I agree with the learned author that in interpreting this section, the local cases have followed the interpretation accorded to it by the Indian cases, without a consideration of the difference in meaning of the word 'evidence' in the Act and the Indian Evidence Act. The learned author further analysed the reasoning of the Singapore Court in arriving at the conclusion and concluded that the confession of a co-accused is in the same position with the evidence given by a co-accused and this means that such a confession is capable of standing on its own.

This view was adopted by Augustine Paul J in *Noliana bte Sulaiman v. Public Prosecutor* [2000] 1 CLJ 36 at p. 45 where he said thus:

> Similarly the confession of a co-accused is entitled to due consideration like any other evidence that has been proved unlike its treatment in the Indian Courts in view of their narrow definition of the word 'evidence' (see *Chin Seow Noi & Ors v. PP* [1994] 1 SLR 135; *Abdul Rashid & Anor v. PP* [1994] 1 SLR 119; *Lee Yuan Kwang & Ors v. PP* [1994] 2 SLR 349 and *PP v. Rozmaan bin Jusoh & Anor* [1994] 2 SLR 181).

I am inclined to adopt and follow the interpretation of s. 30 by the Singapore Court of Appeal as I am of the same view with the learned author that it must be recognised that there is a difference in the provisions in respect of the definition of the word "evidence" in s. 3 between the Indian Evidence Act and our Act. As a result I conclude that a confession by an accused is capable of standing on its own and be used against a co-accused to support a conviction provided the evidence emanating from the confession satisfies the court beyond reasonable doubt of the accused's guilt. The confession of Sukma can therefore be used standing on its own against Dato' Seri Anwar.

*(h) Corroboration*

Before considering whether there is a need for corroboration and whether there is in fact corroboration in this case, I propose to state briefly the law on this subject. The word corroboration had no special technical meaning; by itself it meant no more than evidence tending to confirm other evidence (see *Director of Public Prosecutions v. Kilbourne* [1973] 1 All ER 440). It has also been said that what is required is some additional evidence rendering it probable that the story of the complainant is true and that it is reasonably safe for the court to act upon the evidence. In the celebrated case of *R v. Baskerville* [1916] 2 KB 658 at p. 667 Viscount Reading LCJ said:

> We hold that the evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirm in some material particular not only the evidence that the crime has been committed, but also that the prisoner has committed it.

It has also been held that corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. Corroboration can equally be well afforded by established facts and the logic of established facts sometimes speaks even more eloquently than words (see *Brabakaran v. Public Prosecutor* [1966] 1 MLJ 64).

I shall now deal with the question whether corroboration is required. It was contended by the defence that Azizan, a victim of the alleged sodomy, committed by both the accused is an accomplice and therefore his evidence needs to be corroborated. I have earlier in this judgment dealt with the question of an accomplice and the need for corroboration in respect of the evidence of an accomplice and made a ruling that Azizan is not an accomplice. Nevertheless in a case of this nature which is a sexual offence corroboration of Azizan's evidence is desirable though not technically essential and the court should give sufficient attention to the matter (see *Koh Eng Soon v. Rex* [1950] 16 MLJ 52).

In *Public Prosecutor v. Mardai* [1950] 16 MLJ 33 the accused was charged for an offence of outraging the modesty of a woman under s. 354 of the Penal Code. On the issue of the need for corroboration of the complainant's evidence Spenser-Wilkinson had this to say at p. 33:

> Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated; nevertheless it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant's story.

An allegation of sodomy can be easily made but very difficult to refute and the evidence in support of such a charge has to be very convincing in order to convict the accused. In *Emperor v. Sari Das* AIR [1926] Lahore 375 it was said:

> A charge under Section 377 is one very easy to bring and very difficult to refute. Therefore the evidence in support of such a charge has to be very convincing.

The evidence in support of such a charge must also be corroborated. It is said that "it is unsafe to convict on the uncorroborated testimony of the person on whom the offence is said to have been committed unless for any reason that testimony is of special weight" – see *Ganpart v. Emperor* – AIR [1918] Lahore 322. See also *Bal Mukundo Singh v. Emperor* [1937] 38 Cr. LJ 70 (Cal).

It is therefore trite law that a complainant's evidence in a sexual offence requires corroboration although a conviction founded on the uncorroborated evidence of the complainant is not illegal provided that the presiding judge must warn himself of the danger of convicting on such uncorroborated evidence (see *Chiu Nang Hong v. Public Prosecutor* [1965] 31 MLJ 40.

It was also contended by the defence that Azizan is not a reliable witness and his evidence should be rejected outright and the court does not have to look further and to consider the needs for corroboration (see *Sarwan Singh v. State of Punjab* AIR [1957] SC 637 quoted in *T.N. Nathan v. Public Prosecutor* [1978] MLJ 134). In this connection, it is useful to refer to *Director of Public Prosecutions v. Kilbourne* [1973] 1 All ER 440 at 452 where Lord Hailsham said:

> Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise.

I have found Azizan to be a reliable and truthful witness for the reasons stated earlier in this judgment. It follows that corroboration is required.

The next question to be decided is whether there was corroboration of the evidence of Azizan. It was contended by the defence that there was no corroborative evidence. I shall now deal with the issue whether there was in fact corroboration.

*(i) Evidence Of Dr. Mohd. Fadzil bin Man (SP2)*

This doctor was called by the prosecution as its second witness. His evidence can be summarised as follows. Sukma came alone on 10 November 1994 to his clinic situated at Ampang Park Shopping Centre, Kuala Lumpur. He examined Sukma.

Encik Karpal Singh objected to the evidence to be given by this witness even before the witness began to testify on the ground firstly that the evidence of this witness should not be tendered at this stage before the evidence of the principle witness is led or at least his examination-in-chief has been heard as the nature of the defence will not then have become apparent by cross-examination (see: *Jacob v. Public Prosecutor* [1949] 15 MLJ 70). With due respect that case does not help the defence in the present case as it was dealing with the evidence of system whereas in the present case the purpose of introducing the evidence is to show that Sukma is a homosexual which is relevant to the issue before this court.

It was also contended by the defence that the evidence of bad character of the accused is not admissible as he has not attacked the character of the witnesses for the prosecution or he has not adduced evidence of good

character under s. 54 of the Evidence Act 1950. I am of the view that evidence of bad character is admissible under Explanation 1 of the Evidence Act 1950 which reads:

> This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Secondly, it was argued that the communication between a doctor and patient is privileged, and it would also be a breach of the Code of Conduct governing doctors issued by the Malaysian Medical Council. I overrule the objection as there is no privilege under the law for a doctor from disclosing what transpired between him and his patient. As regards the Code of Conduct, I am of the view that Dr. Fadzil does not commit a breach of his duty of confidentiality by disclosing what transpired between him and his patient (see *W v. Egdell & Ors* [1989] 2 WLR 689).

In *Public Prosecutor v. Haji Kassim* [1971] 2 MLJ 115, the Federal Court held that the privilege excluding professional confidence in s. 126 of the Evidence Ordinance does not protect professional disclosures made to clergymen or doctors.

In his testimony Dr. Fadzil said as a result of his examination, he concluded that Sukma suffered from a mental depression due to biological factors and family background. I need not go into details on the causes of the depression for which Sukma was suffering as it is not necessary. It is, however, relevant and necessary to observe that Dr. Fadzil said that Sukma told him that he had homosexual relationship with his adopted brother and his business partner although he did not disclose the identity of these two persons. According to this witness, the danger of this homosexual activities in which Sukma was involved in is the important factor that cause Sukma mental depression. Sukma was given medicine for his sickness and was told to come back but he never did.

At the end of the testimony, Encik Karpal Singh submitted that the evidence of this witness amounts to introduction of evidence which is prejudicial to both accused irrelevant and amounts to introduction of alleged causation of an offence which has no relation to the charges the accused is facing and applied to the court to expunge the evidence from the record.

I dismissed the application to expunge the evidence as I am of the view that the evidence is relevant. The importance of the evidence of this witness cannot be overlooked and it is this, it establishes the fact that Sukma was involved in homosexual activities with his adopted brother (adik angkat) and his business partner. Dato'Seri Anwar admitted in his evidence that Sukma is his adopted brother. What Sukma told this witness that he was

involved in homosexual activities is a confession as defined under s. 17 of the Evidence Act 1950 and its voluntariness is not disputed. This evidence is admissible to establish the fact that Sukma is a homosexual and is relevant to the issue of sodomy which is the subject matter of the charges against him.

To summarise, I find that the evidence of Dr Fadzil does not amount to corroboration of Azizan's evidence but evidence relevant to show that Sukma is a homosexual. The evidence is not corroboration because it does not relate to the offence of sodomy for which Dato' Seri Anwar is being charged. In other words, the evidence does not confirm the story of Azizan that he was sodomised by both the accused.

*(ii) Evidence Of Tun Hanif bin Omar (SP3)*

It was the contention of the prosecution that the evidence of Tun Hanif (SP3) amounts to corroboration. The evidence relied upon by the prosecution to support this contention is in respect of Dato' Seri Anwar's involvement in unusual sexual activities with two men who could be identified which he told to the Prime Minister. To recollect what Tun Hanif said in his evidence which is relied upon by the prosecution to support their intention is that on 9 October 1993 he went to see the Prime Minister at his office at about 8.30 or 8.35am together with Dato' Zulkifly bin Abdul Rahman, who was at that time the Director of the Special Branch. His purpose of seeing the Prime Minister was to inform him that an investigation by the special branch revealed that there is evidence to show that Dato' Seri Anwar Ibrahim, who was at that time the Minister of Finance has unusual sexual relationship with two persons who could be identified and who were males.

The defence counsels for both accused objected to the evidence and submitted that this evidence should not be admitted as it is hearsay, irrelevant and prejudicial to the accused. The prosecution in reply to the objection submitted that it was leading evidence of similar facts and to rebut the defence and to show intention and state of mind of the accused. I overruled the objection because at that stage it was too early for me to rule whether it would be hearsay, irrelevant or prejudicial. The prosecution may call the special branch officers and the persons involved in the unusual sex activities with Dato' Seri Anwar to prove the allegations. Tun Hanif further testified that one of the persons involved was a Pakistani citizen who had a permanent residence status of the United States. In cross-examination the witness named the two persons who were involved as Sukma and Mior and in re-examination he disclosed a third person involved as Dr. Munawir.

It is to be noted that the evidence given by Tun Hanif on this issue of unusual sex activities involving Dato' Seri Anwar with all the named persons was based on the special branch investigation. The officers who carried out the investigation were not called despite the indication to the court given by the prosecution that Dato' Zulkifly, who was the Director of the Special Branch at that time, would be called. Neither were the three persons alleged to be involved called to testify. After hearing submission by the prosecution and the counsels for both the accused at the end of the prosecution case, I decided not to admit the evidence. The allegations against Dato' Seri Anwar were never verified and for this reason, I rule that Tun Hanif's evidence on this issue is hearsay and therefore inadmissible. It follows therefore that the evidence of Tun Hanif on this issue cannot be considered as corroborative evidence. It is also not admissible as similar facts evidence as it has not been verified. I excluded this evidence as being prejudicial and irrelevant under the principle enunciated in the celebrated case of *Makin v. The Attorney-General for New South Wales* [1894] AC 57 Lord Herschell, Lord Chancellor said at p. 65:

> ... It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

*(iii) The Conduct Of Dato' Seri Anwar*

The prosecution contended that the evidence of Azizan is also corroborated by the conduct of Dato' Seri Anwar which is firstly by asking Azizan to deny his 'Pengakuan Bersumpah' which was sent to the Prime Minister, and secondly by asking SAC1 Musa, the investigation officer to close investigation into the allegation against him. The investigation was in connection with police report No. 2706/97.

I shall now deal with the conduct of Dato' Seri Anwar and determine whether it amounts to corroboration. Azizan testified that he was summoned through Zul Aznam by Dato' Seri Anwar sometime at the end of June 1998 after the 'Pengakuan Bersumpah' (P5) was made. He met Dato' Seri Anwar in a room at his official residence. Azizan said only two of them were in the room. He said Dato' Seri Anwar asked him to deny his 'Pengakuan

Bersumpah' if he is called by the police – in his own words "Dato' Seri Anwar minta saya menafikan surat pengakuan sumpah saya sekiranya saya dipanggil oleh pihak polis". He also said that he did not say anything to Dato' Seri Anwar because Dato' Seri Anwar had asked him to lie about P5 as its contents are true; again in his own words "kerana beliau menyuruh saya untuk berbohong memandangkan penyataan bersumpah saya adalah benar".

In the 'Pengakuan Bersumpah' Azizan said that the act of sodomy took place "sekitar tahun 1992". By this it is clear that it is not confirmed to just acts of sodomy committed in 1992. It could include acts committed in 1991 or 1993. This view is supported by what Azizan said in cross-examination that he did tell Umi Hafilda who drafted P5 some of the places only and the date i.e. sekitar 1992 where the acts took place. He did not tell Umi all the places but this does not necessarily mean that the acts did not take place elsewhere. Therefore when Azizan signed P5 he also had in mind the incident at Tivoli Villa. Thus when Dato' Seri Anwar asked Azizan to deny P5 to the police, the accused is specifically also referring to the Tivoli incident. In my view, this amounts to Dato' Seri Anwar asking Azizan to lie, as stated by Azizan in his evidence, about the acts of sodomy which would include the Tivoli incident. This amounts to suborning of false evidence and is evidence of conduct against the accused under s. 8 of the Evidence Act 1950. I shall deal with the application of this section later.

The second conduct of Dato' Seri Anwar referred to by the prosecution is in respect of his request to SAC1 Musa to close the investigation. SAC1 Musa is the investigation officer of this case. He started to investigate into the allegation of sexual misconduct against Dato' Seri Anwar in 1997 based on a police report lodged by ASP Zull Aznam in connection with an anonymous letter entitled "Talqin Kutuk Anwar Ibrahim" despite his findings that the allegations against Dato' Seri Anwar contained therein were not totally unfounded. The allegations were not fully and completely investigated despite the existence of ample evidence that warranted a full investigation because Dato' Seri Anwar requested him to stop investigation. As a result no further action was taken on this investigation.

Both Azizan and SAC1 Musa were not challenged on this aspect of their testimonies. There is a general rule that failure to cross-examine a witness on a crucial point of the case will amount to an acceptance of the witness's testimony subject to exceptions as highlighted by Raja Azlan Shah CJ (as his Majesty then was) in *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212 at p. 213 where His Lordship referred to the New Zealand case of *Transport Ministry v. Garry* [1973] 1 NZLR 120 where Haslam J said at p. 122:

In *Phipson on Evidence* 11th edition paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, *viz,* where

> ... the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy ... or when counsel indicates that he is merely abstaining for convenience, eg, to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.

In the present case there is no material to apply the exceptions to the general rule on the failure to cross-examine the witness as pointed out in *Wong Swee Chin*'s case and the failure to cross-examine Azizan and SAC1 Musa on this point amounts to an acceptance of their testimony. The two instances of the conduct of Dato' Seri Anwar is subsequent conduct as envisaged in s. 8 of the Evidence Act 1950 and ought to be taken into account. It is admissible under s. 8(2) and illustration (e) of the Evidence Act 1950. Section 8(2) reads as follows:

> The conduct of any party, or of any agent to any party, to suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Illustration (e) reads as follows:

> A is accused of a crime.
>
> The facts that either before or at the time of or after the alleged crime A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence or prevented the presence or procured the absence of persons who might have been witnesses or suborned persons to give false evidence respecting it are relevant.

The conduct of Dato' Seri Anwar was put in evidence as evidence of conduct under s. 8. By asking Azizan to lie to the police it amounts to suborning witness to give false evidence and by asking SAC1 Musa to stop investigation into his sexual activities and misconduct is tantamount to asking SAC1 Musa not to obtain further evidence from witnesses which to my mind is to ask SAC1 Musa to destroy evidence. This is evidence which is relevant to help the court to come to a finding of fact whether there was indeed fabrication of evidence in respect of sodomy alleged to be committed by Dato' Seri Anwar Ibrahim. It is startling to note that the

defence did not touch on this aspect of the evidence. Be that as it may, in my opinion, this evidence of conduct of Dato' Seri Anwar is a circumstance telling against him which he has to explain. This evidence is relevant where it would lend support to show that the accused is guilty (see *Chandrasekaran & Ors. v. Public Prosecutor* [1971] 1 MLJ 153).

For the above reasons and in the circumstances I find that the conduct of Dato' Seri Anwar as described and referred to above is relevant and admissible and to that extend enhances the credibility of Azizan and corroborates his evidence on the allegation of sodomy committed against him.

At this stage it is appropriate for me to refer and to reconsider my earlier ruling in allowing the question posed to Azizan in examination-in-chief which was as follows:

> Orang yang awak katakan meliwat awak lebih dari satu kali pada awal 1992, siapakah orang itu?

This question was objected to by the defence counsel on the ground that it is inadmissible and prejudicial to the accused. When I made the ruling, I did not focus my mind on the evidential value of that evidence. After a proper appraisal of the evidence, I agree with the learned counsel that the evidence is prejudicial. The evidence relates to allegations by Azizan of "liwat" on other occasions. It is mere allegations and the truth of which has not been proved. It cannot therefore amount to similar facts evidence and is therefore inadmissible on the principle laid down in the celebrated case of *Makin v. Attorney-General for New South Wales* [1894] AC 57 at p. 57, where Lord Herschell, LC said:

> It is undoubtedly not competent for the prosecution to adduce evidence of criminal acts other than those covered in the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed, or, to rebut a defence which would otherwise be open to the accused.

I therefore now change my earlier ruling and disallow the questions to be asked as the answer would be prejudicial to the accused.

*(iv) Sukma's Confession (P4) – Whether It Amounts To Corroboration*

The prosecution also contended that the confession of Sukma also afforded corroboration of the evidence of Azizan. I have found the confession was voluntarily made and therefore admissible. I have also found that the relevant part of the confession which is in respect of the commission of sodomy by both Dato' Seri Anwar and Sukma on Azizan is true and reliable. The court can therefore act on the confession. It is a piece of substantive evidence. The relevant part of the confession which has been produced earlier in this judgment clearly implicates not only Sukma (the maker of the confession), but also Dato' Seri Anwar that both sodomised Azizan at Tivoli Villa which is the subject matter of the charges against the accused. I find therefore, that the confession (P4) sufficiently supports and corroborates Azizan's evidence.

Assuming that I am wrong that there was corroboration, I had in my mind the risk of convicting an accused on uncorroborated evidence. I warned myself of the dangers of convicting both accused on the sodomy charges on uncorroborated evidence of Azizan but nevertheless in this case, I am satisfied and convinced that the charges of sodomy against both accused have been proved beyond a reasonable doubt even though there was no corroboration. This principle had been laid down in *Chiu Nang Hong v. Public Prosecutor* [1965] 31 MLJ 40.

*(i) Whether The Charge Is False And Fabricated*

It was contended by the defence that the charges on which Dato' Seri Anwar and Sukma are being tried are false and fabricated. Encik Fernando, the leading counsel for Dato' Seri Anwar submitted that the present charges against both the accused are doomed to failure. He urged the court to consider very carefully why the date in the original charge ie, May 1994 was amended to May 1992 (the first amendment) and subsequently amended to between January to March 1993 (the second amendment) in view of the evidence given by Azizan in respect of the dates. It is not disputed the amendments in respect of the dates were made. This is the prerogative of the prosecution to amend the charges under the law.

The complaint of the defence is not on the right of the prosecution but the reason for the amendment. Azizan was asked in cross-examination about the circumstances which led to the amendment of the charges. Azizan said he could not remember whether he told the police he was sodomised in 1994. It was pointed out by Encik Fernando that the amendment of the date from May 1994 to May 1992 was made because Azizan testified in the previous trial of Dato' Seri Anwar that he was not sodomised after

September 1992. The prosecution wanted a breathing space and amended the charge to May 1992. Encik Fernando also referred to the testimony of Azizan who said that he did not tell the police that he was sodomised one night in 1992. I have dealt with this evidence earlier and concluded for the reasons I had stated that whether Azizan told the police he was not sodomised in May 1992 is not relevant.

This brings me to the question whether the amendment of the charges as they stand on which both accused are tried in this proceeding are false and fabricated. On the evidence of Azizan which I accepted, it is established beyond reasonable doubt that he was sodomised by Dato' Seri Anwar and Sukma at Tivoli Villa between the months of January and March 1993. He denied the suggestion of the defence counsel that his story that he was sodomised at Tivoli Villa as stated in the charges are not true. It is pertinent to note that the testimony of SAC1 Musa clearly shows that Azizan without any hesitation told him that he was sodomised by both the accused at the place and time stated in the charges although Azizan could not remember the exact date. He gave reasons how he could remember the months as it was two or three months after he left as a driver to Datin Seri Dr. Wan Azizah and Sukma has just moved into his apartment at Tivoli Villa. I accept the reasons given by Azizan as to how he could remember the months when the act of sodomy was committed.

**The Ingredients To Be Proved**

I shall now deal with the ingredients to be proved in respect of the charges preferred against both the accused and then consider whether the prosecution has made out a case beyond reasonable doubt against them at the end of the prosecution case. Dato' Seri Anwar faces a single charge whilst Sukma faces two charges. Dato' Seri Anwar is being charged for voluntarily committing carnal intercourse against the order of nature with Azizan bin Abu Bakar, an offence punishable under s. 377B of the Penal Code (NMB Cap. 45). Sukma faces two charges, firstly he is charged for abetting Dato' Seri Anwar in committing the said offence punishable under s. 109 read together with s. 377B of the Penal Code and secondly he is being charged with committing voluntarily carnal intercourse against the order of nature with Azizan bin Abu Bakar, an offence punishable under s. 377B of the Penal Code. I shall deal first with the ingredient to be posed in the charge against Dato' Seri Anwar and in the second change against Sukma first as the offence alleged in the charges are similar.

Section 377B of the Penal Code, under which the charge against Dato' Seri Anwar and against Sukma in the second charge, have been preferred reads as follows:

> Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

Section 377A of the Penal Code provides:

> Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.
>
> Explanation – Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section.

In order to prove the charge of committing carnal intercourse against the order of nature against Dato' Seri Anwar and in the second charge against Sukma it is incumbent upon the prosecution to establish the following ingredients:

(i) that the accused had carnal intercourse with a person;

(ii) that such intercourse was against the order of nature;

(iii) that the accused did the act voluntarily;

(iv) that there was penetration.

I shall now deal with these ingredients.

*(i) Whether Both The Accused Had Carnal Intercourse*

It was submitted by counsels for both accused that the prosecution has failed to establish this ingredient as the evidence of Azizan bin Abu Bakar, the principal witness for the prosecution is not convincing and lacks corroboration. I have dealt at length with the evidence of Azizan and his credibility in an earlier part of this judgment. I had accepted the evidence of Azizan for the reasons which I have considered before arriving at that conclusion. To recapitulate it is sufficient to state that Azizan's evidence show the details of how he was sodomised by both Dato' Seri Anwar and Sukma at Tivoli Villa between the months of January and March 1993 at about 7.45pm. His credibility was saved and there was a truth in his story.

The defence counsel further submitted that the prosecution has failed to prove that both accused has committed the offence as there was no corroboration of Azizan's testimony which is desirable in cases of sexual offences. I have considered this question of corroboration in an earlier part of this judgment where I found that there is corroboration in this case.

I was therefore satisfied that the prosecution has successfully adduced sufficient evidence to prove beyond reasonable doubt that both Dato' Seri Anwar and Sukma had committed carnal intercourse on Azizan. Thus the ingredient under (i) above has been proved beyond reasonable doubt.

*(ii) Whether Such Intercourse Was Against The Order Of Nature*

The evidence of Azizan shows that both Dato' Seri Anwar and Sukma has committed sexual connection with Azizan by the introduction of their respective penis into the anus of Azizan. This incident was clearly narrated by Azizan. In examination-in-chief Azizan said Dato' Seri Anwar at first inserted his penis into his anus from the front when Azizan was lying on his back by lifting both of Azizan's legs. Dato' Seri Anwar's penis remained in Azizan's anus for about two minutes. Azizan complained he was in pain and Dato' Seri Anwar then pulled out his penis from Azizan's anus. Dato' Seri Anwar then applied cream to his penis and Azizan's anus. At the request of Dato' Seri Anwar, Azizan changed his position to a "menonggeng" (crouching) position. Dato' Seri Anwar then introduced his penis into Azizan's anus from behind in that position for quite sometime until he reached orgasm. In cross-examination, Azizan denied the suggestion of Encik Fernando, the leading counsel for Dato' Seri Anwar that he was not telling the truth and was not logical when he said that Dato' Seri Anwar introduced his penis into his anus from in front. With respect, I disagree with the suggestion of the learned counsel for the simple reason that it is not something improbable or difficult to introduce one's penis into the anus of another although it may not be an easy task to perform in reality.

As regards Sukma, there is the evidence of Azizan (SP6) to show that the former sodomised the latter after Dato' Seri Anwar. This was performed while Azizan was in the "menonggeng" position. In this regard, the record of proceedings reads as follows:

| | |
|---|---|
| Soalan: | Semasa Dato' Seri Anwar pergi ke bilik air siapa yang tinggal di bilik tidur? |
| Jawapan: | Saya dan Sukma. |
| Soalan: | Awak nampak Sukma dalam keadaan apa? |
| Jawapan: | Berbogel. |
| Soalan: | Adakah En. Azizan tahu bila Sukma menanggalkan pakaiannya sehingga berbogel? |
| Jawapan: | Tidak tahu. |

Soalan: Ceritakan apa berlaku selepas itu.

Jawapan: Sukma menghampiri saya dan menarik saya pada kedudukan menonggeng.

Soalan: Macam mana dia menarik awak pada kedudukan menonggeng?

Jawapan: Dia berada di tepi katil dan saya masih di atas katil. Dia menarik saya ke arah dia. Dia menarik semasa saya masih dalam keadaan menonggeng.

Soalan: Apa berlaku seterusnya?

Jawapan: Dia terus memasukkan zakarnya ke dalam jubur saya. Dia berdiri ditepi katil semasa dia memasukkan zakarnya ke dalam jubur saya dan saya berada dalam posisi menonggeng.

Soalan: Berapa lama zakarnya berada di dalam jubur awak?

Jawapan: Sehingga saya merasa air maninya keluar di dalam jubur saya.

Soalan: Tetapi berapa lama zakarnya berada di dalam jubur awak sehingga air maninya keluar?

Jawapan: Lebih kurang lima minit.

Azizan's evidence is supported by the confession of Sukma. In the confession Sukma stated "Selepas air mani Datuk Seri Anwar keluar Azizan mengajak saya untuk melakukan liwat terhadapnya. Tapi saya tidak mencapai ketahap maksimum". It is to be noted what he said differs from what Azizan said in evidence. What Azizan said was it was Sukma who pulled him when he was in the "menonggeng" position and introduced his penis into Azizan's anus. Azizan never said he invited Sukma to perform the act. In any event, I am of the view that this contradiction is not material and is minor. The true fact is that Sukma did introduce his penis into Azizan's anus.

It is therefore clearly established by evidence that intercourse was performed by Dato' Seri Anwar and Sukma on Azizan was against the order of nature.

*(iii) Whether Both The Accused Did The Act Voluntarily*

This is the third ingredient to be proved by the prosecution. I am satisfied that on the evidence before this court, both accused committed the act of carnal intercourse against the order of nature voluntarily. There is no contrary evidence to show they were forced to commit the offence. On the other hand, the evidence of Azizan which remains uncontradicted clearly

showed that Sukma invited him to his apartment on the day in question without telling Azizan the purpose for the invitation. In his confession Sukma said, *inter alia,* as follows:

> Saya pernah membawa Datuk Seri Anwar Ibrahim ke rumah saya untuk bertemu Azizan (pemandu kereta Datin Seri) di rumah saya atas permintaan Datuk Seri Anwar Ibrahim untuk melakukan hubungan sejenis. Rumah saya ini di Tivoli Villa.

It is clear from what Sukma said in his confession the hidden purpose of inviting Azizan to his apartment was to assist Dato' Seri Anwar to have carnal intercourse with Azizan at the request of Dato' Seri Anwar Ibrahim himself The act was completed. Under these circumstances the only logical conclusion to be made is that Dato' Seri Anwar committed the act of sodomy at his own request and voluntarily. As for Sukma, I find that he committed the carnal act voluntarily. There is no evidence to show otherwise although in his confession he said that Azizan invited him to perform the act after Dato' Seri Anwar whilst Dato' Seri Anwar went to the bathroom. Azizan in his evidence never said that he invited Sukma to perform the act on him. He was not cross-examined on this issue. I accept Azizan's evidence on this point as being more probable, reliable and credible because if it was he who invited Sukma to perform the act why should this happen immediately after Dato' Seri Anwar has sodomised him in the presence of Dato' Seri Anwar? Sukma was present in the same room at the time Dato' Seri Anwar performed the act and he saw what was going on. Under these circumstances, it can safely be inferred that Sukma himself being a homosexual, had the urge to perform the act as well. Even assuming that Azizan did invite him to perform the act, this does not mean that Sukma was forced to perform the act. He could have refused it. In the absence of other evidence to the contrary, I find that Sukma also performed the act voluntarily.

*(iv) Whether There Was Penetration*

Under the explanation to s. 377A of the Penal Code penetration is sufficient to constitute the sexual connection necessary to the offence. The prosecution has to prove penetration as one of the elements. It was contended by the defence counsels for both Dato' Seri Anwar and Sukma that the prosecution has not proved penetration as Azizan was not sent for medical examination. There is therefore no medical evidence to show penetration. On this point, I am of the view that one of the methods of proving penetration is by way of medical examination. I agree with the submission of the prosecution that penetration need not be proved by medical evidence alone. It can be proved by other evidence such as in this

case by the direct evidence of Azizan which is supported by the confession of Sukma. The evidence of Azizan himself which I accept as reliable is the strongest evidence to prove penetration. The admission of Sukma in his confession stating that Dato' Seri Anwar did sodomise Azizan until he reached orgasm is yet another piece of evidence to prove penetration. In this connection, it is useful to recollect what Sukma said in the confession in his own words which are as follows:

> Saya ada melihat hubungan mereka berdua sekejap-sekejap. Di antara hubungan mereka ianya terjadi oral dan liwat iaitu Datuk Seri Anwar Ibrahim melakukan ke Azizan dengan menggunakan cream baby tanpa menggunakan kondom. Selepas air mani Datuk Seri Anwar keluar Azizan mengajak saya untuk melakukan liwat terhadapnya. Tapi saya tidak mencapai ketahap maksimum. Semasa saya melakukan liwat ke atas Azizan Datuk Seri Anwar berada di bilik air.

I find that the prosecution has proved beyond reasonable doubt the element of penetration.

It was also submitted by both counsels for Dato' Seri Anwar and Sukma that it is incumbent upon the prosecution to prove potency of both the accused. The prosecution has not adduced evidence to prove potency of both accused. It has been said in the case of *Gopala bin Rama* [1896] Unrep. Cr C 865 (a decision of the Bombay High Court) that penetration is only possible if the male organ had the power of erection, which, again, postulates that the man was potent (see *Gour, Penal Law of India*, 10th edn, vol. 4, p. 3237). As regard to the question of potency in *Gopala*'s case, the learned author commented:

> In Bombay it appears to have been laid down that potency of the accused must be proved in each case, but, it is submitted, this is not necessary, as potency being the usual and normal state of man, it will be presumed, until the contrary is established by the accused.

In *Ratanlal & Dhirajlal's Law of Crimes*, 24th edn, vol. 2, p. 1800 the need for the prosecution to prove potency is considered as not being sound.

The learned defence counsel in the present case also referred to *Kesavan Senderan v. PP* [1999] 1 CLJ 343. It was pointed out that in that case the accused who was hanged and convicted under s. 377B of the Penal Code, was sent to the doctor who conducted the potency test on him. The defence urged this court to consider the failure of the prosecution to adduce evidence to establish the potency of both the accused as fatal to its case. With due respect, I am unable to accept the contention that the failure to adduce such evidence is fatal to the prosecution case. In *Kesavan*'s case it was not the decision of the court that the prosecution must prove potency

of the accused but that the result of the potency test would merely be one of the many pieces of evidence taken into consideration in deciding whether to believe the evidence of the complainant.

The views of the learned judge appears to be in harmony with the views expressed by the learned authors in *Gour, Penal Law of India* and in *Ratanlal & Dhirajlal's Law of Crimes* referred to earlier which is that it is not necessary that the potency of the accused must be proved in each case as potency will be presumed until the contrary is proved by the accused. I agree with these views and venture to add that if the defence of the accused is that he is impotent, it is up to him to establish that fact. For the reasons stated, I rule that it is not incumbent upon the prosecution to prove potency of both Dato' Seri Anwar and Sukma to establish its case beyond reasonable doubt at the end of the case for the prosecution.

**Abetment**

I shall now consider the ingredients to be proved in the first charge against Sukma which states that he did abet in the commission of the offence by Dato' Seri Anwar of carnal intercourse against the order of nature with Azizan bin Abu Bakar, an offence punishable under s. 109 read together with s. 377B of the Penal Code.

Section 109 reads:

> Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Section 107 of the Penal Code defines "abetment of a thing" as follows:

> A person abets the doing of a thing who:
>
> (a) Instigates any person to do that thing;
>
> (b) Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> (c) Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 2: to s. 107 reads:

> Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

**The Evidence Adduced**

In order to prove the charge of abetment the prosecution has to establish that Sukma has done any one of the acts referred to in s. 107 of the Penal Code. To establish its case against Sukma on this charge the prosecution relies on the evidence of Azizan. I had ruled that the evidence of this witness is reliable, credible and acceptable. The question now to be considered is whether there is evidence adduced through this witness to show the complicity of Sukma in the abetment of the offence for which Dato' Seri Anwar has been charged. The prosecution also relies on the accused's own confession to prove the abetment. I shall deal with the evidence of Azizan first. In his testimony Azizan said that at about 3pm on the alleged date of the offence he met Sukma at Dato' Seri Anwar's house. Sukma invited him to visit his apartment at Tivoli Villa in Bangsar but he did not tell him the reason for the invitation nor did he tell Azizan that Dato' Seri Anwar would be coming too.

In his confession Sukma admitted that he brought Dato' Seri Anwar to his apartment to meet Azizan at the latter's request. In his own words which appears in the confession at pp. 12 and 13 Sukma said:

> Dalam lebih kurang dua atau tiga tahun yang lalu waktu dan tahun yang tepat saya tidak ingat saya pernah membawa Datuk Seri Anwar Ibrahim ke rumah saya untuk bertemu Azizan (pemandu kereta Datin Seri) di rumah saya atas permintaan Datuk Seri Anwar Ibrahim untuk melakukan hubungan sejenis. Rumah saya ini di Tivoli Villa tadi. Dianya terjadi seperti begini. Saya membuat janji kepada Azizan agar beliau datang ke Tivoli Villa pada pukul 7.30 petang. Pada pukul 7.00 petang saya menjemput Datuk Seri Anwar Ibrahim dari rumah resmi beliau ke Tivoli Villa. Kami tiba di Tivoli Villa pada 7.15 petang, kurang lebih, dan pada 7.30 petang, Azizan datang ke rumah saya dengan kenderaan beliau sendiri.

Azizan said he arrived at Tivoli Villa at about 7.15pm. On arrival at the apartment he was startled when he saw Dato' Seri Anwar was present there. Dato' Seri Anwar performed the act of carnal intercourse on Azizan. It is also in Azizan's evidence that Sukma was present at that time in the room and he was watching what was then going on. This evidence is supported by Sukma's confession wherein he said at p. 13:

> Setelah kami bertiga bersama, Datuk Seri Anwar dan Azizan membuka baju masing-masing untuk mengadakan hubungan sejenis, saya ada melihat hubungan mereka berdua sekejap-sekejap.

On the evidence, I am satisfied that Sukma was actually present in the room when the act of sodomy took place. It was the submission of the defence that mere presence of Sukma does not amount to abetment. According to the defence, there is no evidence whatsoever of instigation, conspiracy or aiding by Sukma to prove his participation in the commission of the offence by Dato' Seri Anwar. The case of *Shri Ram v. State of U.P.* AIR [1975] SC 175 was cited to support the contention that in order to constitute abetment the abettor must be shown to have "intentionally" aided and abetted the commission of the crime and therefore active complicity is the gist of the offence of abetment under the third paragraph of s. 107 of the Indian Penal Code (which is similar with s. 107 of our Penal Code).

The learned counsel referred to the case of *Rajmal Marwadi v. Emperor* [1925] Nagpur 372 where it was held:

> It was long ago laid down in the case of *Queen v. Nim Chand Mookerjee* that in order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal.

It has been held that a person who is present at the time of the commission of an offence and takes some part therein is said to aid and abet the commission of the offence. In *Ferguson v. Weaving* [1951] 1 KB 814 at p. 818 Lord Goddard CJ said:

> It is well known that the words "aid and abet" are apt to describe the action of a person who is present at the time of the commission of an offence and takes some part therein.

It has also been said in *The Queen v. Coney & Others* [1882] Vol. VIII 534 to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to investigate the principal or principals. At p. 557 and 558 it is further said by Hawkins J:

> It is no criminal offence to stand by, a mere passive spectator of a crime even of a murder. Non interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his discent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully

> encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not. So if any number of persons arrange that a criminal offence shall take place, and it takes place accordingly, the mere presence of any of those who so arrange it would afford abundant evidence for the consideration of a jury for an aiding and abetting.

In our local jurisdiction, it has been held in *Public Prosecutor v. Tee Tean Siong & 8 Others* [1963] 29 MLJ 201 that in the absence of other evidence, mere attendance at a show where "blue films" are exhibited does not amount to abetment of the offence of exhibition under s. 292(a) of the Penal Code. Hashim J gave examples of the acts of the person or persons in attendance which amount to evidence of abetment. At p. 201 the learned judge said:

> If, on the other hand, there is any cogent evidence that a few persons got together and incited or encouraged the possessor of the film to give a show by actually offering him payment in circumstances in which but for such incitement or encouragement there would have been no show, or where he provides knowingly the accommodation for such exhibition, such act will be caught by s. 109 of the Penal Code and not otherwise.

In the present case the evidence as stated earlier shows that Sukma invited Azizan to his apartment and made arrangement for Dato' Seri Anwar to be present at the same time for the purpose of committing the act of sodomising Azizan. These are acts which connect Sukma with the steps of the transaction which are criminal as stated in *Rajmal Marwadi* are also acts which show that Sukma intentionally aided and abetted the commission of the offence as envisage under the third limb of s. 107 of the Penal Code and are also acts done by Sukma to facilitate the commission of the offence under explanation 2 of s. 107.

It is also established by evidence that Sukma was voluntarily and purposely present witnessing the commission of the offence by Dato' Seri Anwar and offered no opposition to it or at least to express his dissent. Thus the presence of Sukma cannot be taken to mean mere presence but more to it, it would under the circumstances afford cogent evidence which would justify this court in finding that Sukma wilfully encouraged the commission of the offence and so aided and abetted it (see *The Queen v. Coney and Others* [1882] Vol. VIII 534).

Further there is also evidence in the confession that Sukma brought Dato' Seri Anwar to his apartment for the purpose of allowing the latter to sodomise Azizan and such act of Sukma is evidence of active complicity on the part of Sukma and is caught by s. 109 of the Penal Code (see *Public Prosecutor v. Tee Tean Siong & 8 Others* [1963] 29 MLJ 201). The result

is that I find as a fact that the prosecution has proved beyond a reasonable doubt that in fact and in law Sukma abetted Dato' Seri Anwar in the commission of the act of sodomy on Azizan as particularised in the first charge against Sukma.

Having regard to the totality of the evidence adduced so far by the prosecution and after carefully considering the submission of counsels for both the accused and the prosecution, I am satisfied that the prosecution has successfully established a case beyond a reasonable doubt against Dato' Seri Anwar and Sukma on the offences for which they are being charged. If they choose to remain silent at this stage which I hold they are perfectly entitled to do they can be convicted on the charges. As a consequence my order was that Dato' Seri Anwar and Sukma were called upon to enter their defence on the charges against them. When the three alternatives were explained to them, both accused elected to give evidence on oath.

**The Case For The Defence**

Both Dato' Seri Anwar and Sukma gave evidence on oath and they called a total of 29 other witnesses between them to testify on their behalf. I propose to deal briefly with the evidence of Dato' Seri Anwar first. The relevant part of his evidence will be considered in detail when necessary later in this judgment when I deal with the defences of Dato' Seri Anwar. His testimony started with his involvement in politics. He was elected as a member of Parliament in 1982 when he was 36 years old. He was appointed as a Deputy Minister in the same year. A year later in 1983 he became a member of the cabinet when he was appointed as a Minister of Culture Youth and Sports. In 1984 he was appointed as a Minister of Agriculture; 1986 as Minister of Education and in 1991 as a Minister of Finance. In 1993 he was promoted as the Deputy Prime Minister and concurrently holding the portfolio of Minister of Finance. His dismissal from the cabinet and from UMNO in September 1998 was an anticlimax to his meteoric rise in the political arena.

The defence of Dato' Seri Anwar substantially is that of alibi, denial that he went to Tivoli Villa and conspiracy to fabricate evidence. In addition the defence counsels raised the following issues in relation to Dato' Seri Anwar's defence which are as follows:

(a) reviewing the ruling on the admissibility of Sukma's confession (P4) and Azizan's credibility.

(b) that the charge against him is false and fabricated.

(c) corroboration.

(d) press statements in the newspapers.

I now deal with the defence and the other issues raised separately.

*(1) The Alibi*

It is contended by the defence that Dato' Seri Anwar did not go to Sukma's apartment in Tivoli Villa between January to March 1993, as stated in his evidence. In this connection the evidence of Dato' Seri Anwar runs as follows:

Question : Saya katakan Dato' Seri ada pergi ke pangsapuri Sukma di alamat Unit No. 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar di sebelah petang di antara bulan Januari dan Mac 1993?

Answer : Tidak benar sama sekali.

Question : Saya katakan kepada Dato' Seri, Azizan ada datang ke pangsapuri tersebut apabila Dato' Seri sudah berada di situ?

Answer : Tidak benar.

Question : Saya katakan kepada Dato' Seri, bahawa Sukma berada di pangsapuri tersebut pada masa itu.

Answer : Tidak benar.

Question : Saya katakan kepada Dato' Seri, lebih kurang jam 7.45 malam Dato' Seri telah meliwat Azizan di dalam sebuah bilik di pangsapuri tersebut.

Answer : Tidak benar. Fitnah jahat yang direka-reka oleh musuh-musuh politik saya.

In support of the contention that Dato' Seri Anwar did not go to Sukma's apartment at the time he was alleged to have committed the offence as stated in the charge on which he is being tried, evidence of alibi was adduced which forms one of his defences.

To begin with Encik Karpal Singh in his submission adverted to the evidence of SAC1 Musa who testified in cross-examination that he was prepared to investigate further into the defence of alibi. It is to be recollected that the notice of alibi was given by the defence counsels for both accused based on the charges against both accused which stated the date of the alleged commission of the sodomy in May 1992. At the commencement of the trial when the charges against both accused were

amended in respect of the date to between January to March 1993, En. Karpal Singh applied for an adjournment to enable SAC1 Musa to carry out further investigation into the alibi in view of the amendment. However, the learned Attorney-General informed the court that he has advised SAC1 Musa who said he was prepared to carry out the investigation that there is no necessity to carry out further investigation as the prosecution has the record of the movement of Dato' Seri Anwar from 1992 right up to 1998. The learned Attorney-General also indicated that in the event the defence is called and the defence of alibi is raised, it will be countered by evidence in the possession of the prosecution. It was argued by En. Karpal Singh that having regard to the disclosure made by the learned Attorney-General that the prosecution has knowledge of the movement of Dato' Seri Anwar, it is incumbent on the prosecution to lead evidence on this issue even if the evidence would be against the prosecution. It was submitted that the failure of the prosecution to adduce evidence on the movement of Dato' Seri Anwar between 1992 to 1998 is fatal and the court can conclude that both the accused are entitled to an acquittal.

With due respect I am unable to agree with the submission of the learned counsel for the reason that I am of the view it is not necessary for the prosecution to adduce evidence of the movement of Dato' Seri Anwar between 1992 to 1998 as this is not one of the ingredients of the charge. On the other hand, it is my considered view that it is for the defence to adduce evidence on the whereabouts of Dato' Seri Anwar during that period in connection with the alibi of Dato' Seri Anwar to create a reasonable doubt on the prosecution case. The submission of the learned defence counsel is therefore without merit.

Having said that I shall now deal with the evidence adduced to support the defence of alibi of Dato' Seri Anwar. A number of witnesses were called to testify on behalf of Dato' Seri Anwar to show the alibi which covers the period between 4 February to 31 March, 1993. It is the defence case that Dato'Seri Anwar was not around in Kuala Lumpur around that period. Dato' Seri Anwar in his evidence stated that he was in London from 4 February 1993 to 9 February 1993 on an official visit to the United Kingdom accompanied by Tun Daim, Tan Sri Ali Abdul Hassan who was then the D.G. of the Economic Planning Unit, Dato' Yaacob bin Abdul Hamid, a Treasury Officer and Khong Kim Yoon, a Bank Negara official.

He left London for Paris in the evening of 9 February 1993. He was in Paris until the morning of 11 February 1993. He was accompanied by the same persons who were in London with him except Tun Daim and some personnel from the private sectors namely Tunku Adnan Mansor, Abdul

Aziz Othman from Bank Bumiputra, Low Gee Teong from Asia Pacific Land and Dato' Shaari Ramli. The purpose of this visit was to promote Labuan as an International Offshore Financial Centre.

From Paris, Dato' Seri Anwar proceeded to Frankfurt, Germany. He arrived in Germany on 11 February 1993 and remained there until 13 February 1993. From Frankfurt he left for home and arrived at Kuala Lumpur in the morning on Sunday 14 February 1993.

Encik Mohd. Zaid bin Ismail (SD14) who was at the material time the Pengarah Jabatan Hasil Dalam Negeri, Labuan testified that Dato' Seri Anwar was in London, Paris and Frankfurt in the month of February 1993. He was one of the members of Dato' Seri Anwar's delegation. He left Kuala Lumpur for London on 6 February 1993. He confirmed that from London Dato' Seri Anwar proceeded to Paris and Frankfurt. He attended together with Dato' Seri Anwar the dialog sessions with investors in London, Paris and Frankfurt.

On 16 February 1993 (Tuesday) he hosted a dinner for the delegates attending the OIC Conference in Kuala Lumpur. He left his house at 7.40 or 7.45pm. The dinner ended at about 10.45 to 11pm. Amongst the guests attending the reception was the Rector of International Islamic University and the Secretary General of the OIC.

On 17 February 1993 (Wednesday) he attended a poetry recital function at the Auditorium Dewan Bandaraya. He was there from 8pm to about 11pm.

On 18 February 1993 (Thursday) he attended the Waltz Disney Ice Skating Show at Stadium Negara from 8pm to about 11.30pm.

He left for Penang on 20 February 1993 and from there he left for Bangkok on 21 February 1993 and stayed there until 23 February 1993. To support this part of alibi he called Encik Jojie Samuel a/l M.C. Samuel, Salman bin Ahmad and Dato' Zainal Abidin bin Alias to testify. Encik Jojie Samuel a/l M.C. Samuel, an Assistant Secretary, Ministry of Foreign Affairs in Kuala Lumpur was called as defence witness (SD22). He confirmed that Dato' Seri Anwar was on an official visit to Bangkok, Thailand from 21 February to 23 February 1993 to attend a forum entitled "Towards One South East Asia in the 21st Century". The itinerary of Dato' Seri Anwar's visit to Bangkok is exh. D49.

Encik Salman bin Ahmad (SD24) who was at the material time Pegawai Penasihat Kedutaan Malaysia in Bangkok and Dato' Zainal Abidin bin Alias (SD25) who was at the material time the Malaysian Ambassador to

Thailand in their evidence confirmed that Dato' Seri Anwar was in Bangkok from 21 February to 23 February 1993 attending the forum "Towards One South East Asia in the 2lst Century". They said in their evidence Dato' Seri Anwar arrived in Bangkok on Flight MH 780 which left Penang at 1.20pm. He left Bangkok for Kuala Lumpur on Flight TG 423 at 1pm.

He returned to Kuala Lumpur on 23 February 1993 on the first day of Ramadhan. The month of Ramadhan in 1993 was from 23 February to 25 March 1993 and this period is excluded for the purpose of the alibi as Azizan in his evidence said the act of sodomy by Dato' Seri Anwar did not take place during the month of Ramadhan.

From 24 March to 29 March 1993 Dato' Seri Anwar was in Penang spending his Hari Raya there. In the evening on 29 March he attended an UMNO dinner function in Penang which was also attended by the then Menteri Besar of Johore, Tan Sri Muhyiddin Yassin and the then Deputy Chief Minister of Penang, Dr. Ibrahim Saad. He returned to Kuala Lumpur the same night after the dinner. On 30 March 1993 he hosted an open house at his residence for Hari Raya which lasted from 9 or 9.30pm to 10 or 11pm.

On 31 March 1993 he was at the residence of International Islamic University Rector, Dr. Abdul Hamid Abu Sulaiman for Maghrib prayer and a gathering of about thirty Muslim scholars. The function ended at 10.30 or 11pm.

It is appropriate at this stage to state briefly the law on the defence of alibi. The defence of alibi is a legitimate defence and in fact is often the only evidence of an innocent man (see *Vasan Singh v. Public Prosecutor* [1989] 2 CLJ 402).

In *Shanmugam v. Public Prosecutor* [1963] 29 MLJ 125 it was held that where the defence to a criminal charge is an alibi, it is not necessary that the accused prove his guilt beyond reasonable doubt. All that he has to do is to cast a doubt upon the prosecution's story; it is not necessary for this to be achieved that the evidence of the accused be corroborated.

In *Illian & Anor. v. Public Prosecutor* [1988] 1 MLJ 421 it was held that as regards the defence of alibi, all that an accused person need to do is to raise a reasonable doubt that he was the person at the scene of the crime, the proper approach is for the trial judge to consider, at the close of the defence case whether he had succeeded in doing so.

Bearing in mind the law as stated above the question to be considered is whether Dato' Seri Anwar has succeeded in raising a reasonable doubt that he was at the scene of the crime at the time as stated in the charge that is between January to 31 March 1993. It is clear that from Dato' Seri Anwar's evidence and the evidence of Encik Mohd. Zaid (SD14), Encik Jojie Samuel (SD22), Encik Salman (SD24) and Dato' Zainal Abidin (SD25) as stated above the defence has successfully established the alibi of Dato' Seri Anwar covering the period from 4 February to 31 March 1993 with the exclusion of 15 February 1993 being a Monday. As regards 15 February (Monday) Azizan said in his evidence that he was at work the day before the said incident. I agree with the contention of the defence that on this evidence Monday would be excluded from the period as Azizan had also stated that he worked from Mondays to Saturdays. Now with respect to Friday (19 February) it was the contention of the defence that the incident could not have happened on a Friday as Azizan said he could not remember whether the day on which the sodomy by both the accused took place was a Friday. He said he performed Zohor prayer in his office on that day. This does not mean that the day could not be a Friday. It is not conclusive proof that if a person performed the Zohor prayer that day could not be a Friday as it does happen that a person may not go to Mosque for Friday prayer due to some reasons. I therefore disagree with the learned counsel's contention that 19 February (Friday) is excluded. The prosecution did not challenge the alibi covering the said period. I therefore accepted the alibi for that period.

It is to be remembered that the charge states that Dato' Seri Anwar is alleged to have committed the act of sodomy on Azizan at 7.45pm between January and March 1993. As the evidence of alibi adverted to above covers only the period from 4 February to March 1993 with the exclusion of Saturdays, Sundays and Mondays, we are left with the period from the whole of January to 3 February 1993 to be considered. There is no evidence adduced by Dato' Seri Anwar or his witnesses to show his whereabouts from the whole of January to 3 February 1993. I therefore hold that the defence of alibi fails to raise a reasonable doubt as to his guilt or in the truth of the prosecution case.

*(2) Denial By Dato' Seri Anwar That He Went To Tivoli Villa As Stated In The Charge*

Dato' Seri Anwar in his evidence denied he went to Sukma's apartment at Tivoli Villa as alleged in the charge. This is a denial which I rejected in the face of overwhelming and convincing evidence of Azizan and Sukma. In his confession Sukma said that Dato' Seri Anwar was in fact in Tivoli Villa where he committed the act of sodomy on Azizan.

*(3) Conspiracy To Fabricate Evidence*

One of the substantive defences of Dato' Seri Anwar is that there was a political conspiracy to fabricate evidence against him. If it can be established that there was such a conspiracy, Dato' Seri Anwar would be entitled to an acquittal. It was contended that there was a high level conspiracy to topple Dato' Seri Anwar by procuring and using fabricated evidence. In trying to establish that there existed such a conspiracy to fabricate evidence Dato' Seri Anwar himself gave evidence and called a number of witnesses. I shall now analyse the evidence adduced and decide whether there was in fact such a conspiracy to fabricate evidence.

Dato' Seri Anwar alleged tha the conspiracy to topple him involved the Prime Minister, Tun Daim Zainuddin, Dato' Seri Rafidah Aziz, Tan Sri Rahim Thamby Chik, Dato' Megat Joned, Datuk Aziz Shamsuddin, Tan Sri Tajuddin Ramli, Tan Sri Wan Azmi and Tan Sri Halim Saad. I reminded the learned counsel for the defence that a conspiracy to topple Dato' Seri Anwar from his government and party posts are not relevant to the issues before the court. Political rivalry and toppling one another is common amongst politicians and is a norm in the daily activities. I also reminded the defence at the same time that a conspiracy to fabricate evidence against Dato' Seri Anwar as far as the sodomy charge is concerned is undeniably relevant and the defence should therefore adduce evidence within that perimeter. Mr. Fernando in fact appreciated this observation. Dato' Seri Anwar said political and corporate figures were unhappy with him because he brought to the attention of the Prime Minister their wrong doings and misconduct including corrupt practices and abuses of power.

To support the allegation of conspiracy Dato' Seri Anwar gave lengthy evidence and the relevant parts can be summarised as follows: He said he was very loyal to the Prime Minister and respected him. His relationship with the Prime Minister was very cordial in the beginning. He said that in 1997 when he was acting Prime Minister he came to know that some ministers and party leaders were not happy with his stand on issues concerning corruption, abuse of power and wastage of fund on mega projects. He had discussed these issues with the Director General of the Anti Corruption Agency and the Attorney-General. Both of them had informed him that when a decision has been made by them to prosecute they had difficulties in doing so because the Prime Minister did not agree with them. Dato' Seri Anwar continued his testimony and said that he had no choice but was forced to bring to the attention of the Prime Minister the issue of corruption when there was ample evidence and documents to support it.

Dato' Seri Anwar testified that he began his discussion with the Prime Minister on the issue of corruption as early as in 1995 involving Tan Sri Rahim Thamby Chik when he handed to the Prime Minister the proposed charge against Tan Sri Rahim which was handed to him by the Attorney-General in connection with a $39 million in his name. He also testified that later in the same year at the request of the Prime Minister, he conveyed to Tan Sri Rahim that he had to resign as the Chief Minister of Melaka as there was an allegation that he was involved in a sex scandal with an underaged girl. Tan Sri Rahim wrote a letter of resignation in front of him. He also said that Tan Sri Rahim came to see him later at the end of 1995 seeking for his help to stop an investigation into his income tax affairs by the Jabatan Hasil Dalam Negeri. Dato' Seri Anwar said he did not help him in this matter.

He further testified that he told the Prime Minister about Dato' Seri Rafidah Aziz's involvement in corrupt practices. He handed to him documents which were given by the Attorney-General concerning alleged corruption involving Dato' Seri Rafidah Aziz who was at that time and still is a minister in the administration. The allegation against Rafidah was that she was involved in corrupt practices and that there were proposed charges framed by the Attorney-General's chambers against her. Dato' Seri Rafidah Aziz came to know about his discussion with Dato' Seri Dr. Mahathir. She came to see Dato' Seri Anwar a couple of times and at the meeting Dato' Seri Rafidah raised the issue of her alleged involvement in corrupt practices which Dato' Seri Anwar raised with Dato' Seri Dr. Mahathir. She was not happy with him and she appeared to give the impression that it was he who was instrumental in the initial investigation by the Anti Corruption Agency and the subsequent proposed charges against her by the Attorney-General's Chambers. She also voiced her dissatisfaction over certain projects and she mentioned specifically Gunawan Steel. She was not happy with the way the Prime Minister and Tun Daim were handling the project. She was not happy with Tun Daim because he was awarded too many privatisation projects, land and shares. Dato' Seri Anwar advised her to clarify with the Prime Minister about her complaints, but instead she wrote a letter (exh. D12) to him. The letter discloses her dissatisfaction with the various accusations and insinuations about her integrity. She said *inter alia* in the letter that she was not worried but was simply fed up with the insinuations and allegations against her. She also stated that she wanted Dato' Seri Anwar to talk to the Prime Minister about this and to convey to the Prime Minister that she was simply not interested in who gets what and all she cares about is that she does her work properly, ethically and responsibly. She was upset about the allegations levelled against her and she wanted Dato' Seri Anwar to take up this matter

with the Prime Minister. It is clear to me that this letter was written to voice her dissatisfaction with the way the Prime Minister was handling certain matters. It does not in any way show that she was angry with Dato' Seri Anwar. Therefore the allegation by Dato' Seri Anwar that Dato' Seri Rafidah was angry with him and that was why she conspired with the others mentioned earlier to fabricate evidence against him is baseless.

The next point to be considered is the allegation levelled by Dato' Seri Anwar against Tun Daim. Dato' Seri Anwar also complained to the Prime Minister about Tun Daim. He testified that Tun Daim had received shares and cash more than US$600 million from three corporate figures namely Tan Sri Halim Saad, Tan Sri Wan Azmi Hamzah and Tan Sri Tajudin Ramli. He told the Prime Minister about this and handed to him the relevant documents in connection with the transaction. He claimed that no investigation or action was taken against Tun Daim by the Prime Minister. He further testified that Tun Daim played a very pronounced role in instigating the Prime Minister to remove him from the cabinet or party posts. He said Tun Daim instigated the Prime Minister to remove him to protect his business empire. He asked Tun Daim why he was so concerned in asking him to resign and to plan with the Attorney-General the charges against him. It is in evidence that Tun Daim informed Dato' Seri Anwar on 12 August 1998 in the morning before the cabinet meeting that the Attorney-General had told him that he (Dato' Seri Anwar) would be prosecuted immediately. This evidence is admissible to show the fact that Tun Daim told Dato' Seri Anwar that he would be prosecuted but not as to its truth as neither the Attorney-General nor Tun Daim were called to give evidence on this issue.

Dato' Seri Anwar gave a number of other instances of Tun Daim's wrong doings which he told to the Prime Minister to show that Tun Daim was unhappy with him. I do not find it necessary to deal with these instances as I find there are other evidence to show Tun Daim's attitude towards Dato' Seri Anwar. To my mind the instances were referred by Dato' Seri Anwar in his evidence to highlight his displeasure with Tun Daim. Whatever wrong doings Tun Daim may have committed is not relevant to the issue before this court. What is relevant is whether as a result of what Dato' Seri Anwar had told to the Prime Minister about Tun Daim, Tun Daim was angry with Dato' Seri Anwar and conspired to fabricate evidence. I find there is no evidence that Tun Daim conspired to fabricate evidence. Dato' Seri Anwar also said that he came to know Tun Daim met Umi Hafilda in pursuance of the conspiracy to fabricate evidence. This again, sad to say, is mere allegations. There is no evidence to show there was such a meeting and what was discussed between them. The evidence therefore does not help the defence to show there was a conspiracy to fabricate evidence involving Tun Daim.

Now I move on to consider the role of Dato' Megat Joned. Dato' Seri Anwar reported to the Prime Minister that Dato' Megat Joned was trying to influence the Attorney-General and the judiciary to protect Dato' Seri Rafidah Aziz and to reduce the proposed charges against her. This is a wild allegation and which is very mischievous. Dato' Seri Anwar tried to refer to a letter written by Dato' Megat Joned dated 21 September 1994 addressed to the Prime Minister. The Attorney-General objected to the admission of this letter on the ground that it is not relevant to the present case. It concerns a case involving a senior officer attached to Dato' Seri Rafidah Aziz's ministry. It does not concern her and is therefore totally irrelevant. Encik Fernando argued that the letter is relevant as investigation has started. To this Dato' Ghani for the prosecution replied that the letter was written on 21 September 1994 before any recommendation was made concerning Dato' Seri Rafidah Aziz. After hearing the arguments, I ruled the letter is not relevant and ordered that it should not be marked as an exhibit.

Another point raised by Dato' Seri Anwar with the Prime Minister concerning Dato' Megat Joned was his alleged involvement in the murder of one Mustakizah and his gambling habit in the office. According to Dato' Seri Anwar, Dato' Megat Joned was very uneasy when he learnt that Dato' Seri Anwar had informed the Prime Minister about this. He also told the Prime Minister that Dato' Megat's son was allotted shares by Dato' Seri Rafidah Aziz. Dato' Seri Anwar also testified that he was informed by the Special Branch that Dato' Megat Joned was one of those involved in distributing the poison pen letters about him. Dato' Megat Joned came to see him and said that he was not involved in distributing the letters but there is a possibility that his wife Ziela may be involved. Dato' Seri Anwar said that the Special Branch's report sent to the Prime Minister stated that Dato' Megat Joned was involved in the conspiracy but was denied by Dato' Seri Megat Joned.

The other person suspected by Dato' Seri Anwar as one of the conspirators to fabricate evidence against him is Dato' Aziz Shamsuddin who was the Prime Minister's political secretary at the material time. Dato' Seri Anwar testified he informed the Prime Minister that from what he gathered from the head of the Special Branch he suspected that Dato' Aziz Shamsuddin was involved in a conspiracy to topple him by soliciting the help of Taib Salamon and B.K. Tan to defame him. He also informed the Prime Minister that Edaran Positif, a company owned by Dato' Aziz's son, Edy Aziz applied for a big contract with Angkasapuri which was not approved by the treasury. He further alleged that there was bad blood between Tan Sri Rahim Thamby Chik, Dato' Seri Rafidah Aziz, Tun Daim Zainuddin, Dato'

Megat Joned and Dato' Aziz Shamsuddin and Dato' Seri Anwar as a result of his reports of corrupt practices and wrong doings against them to the Prime Minister. They were angry with him and conspired to fabricate evidence against him.

To determine whether there is a conspiracy to fabricate evidence involving those people mentioned by Dato' Seri Anwar, it is necessary to scrutinise the evidence adduced by the witnesses called by the defence. In attempting to establish that there was such a conspiracy the defence called as witnesses Raja Kamaruddin bin Raja Abdul Wahid (SD6), DSP Zull Aznam bin Hj. Haron (SD15), Abdullah Sani bin Said (SD17), Ma'amin bin Latip (SD18), Jamal Abder Rahman (SD19), Mohd. Azmin bin Ali (SD21), Norazman bin Abdullah (SD28), Dato' Shafee bin Yahya (SD30) and Manjeet Singh Dhillon (SD31). I shall now deal briefly with the relevant testimonies of these witnesses.

First, the testimony of Raja Kamaruddin bin Raja Abdul Wahid (SD6) (Raja Kamaruddin) who was at the material time Ketua UMNO Cawangan Bukit Seri Andalas in Kelang, Selangor. The importance of the evidence of this witness, if it is admissible, would show the active role of Dato' Aziz Shamsuddin in fabricating of evidence against Dato' Seri Anwar. He testified that four days after the UMNO general assembly in 1998, he was called by Dato' Rais Zainuddin, a friend whom he has known since 1984/85, to his office. At that time three other UMNO activists namely Zul, Haji Zaharudin, and Omar were also present. He said he was told that there was a directive from Dato' Aziz Shamsuddin, who was at the material time the political secretary to the Prime Minister, to prevent (menyekat) Dato' Seri Anwar from becoming the Prime Minister. They had four meetings amongst themselves. He also said that on 26 June 1998 at about 11.45am they were brought by Dato' Rais Zainuddin to Dato' Aziz Shamsuddin's office which was situated at the Prime Minister's Department. According to this witness Dato' Aziz Shamsuddin recruited all five of them namely Dato' Rais Zainuddin, Zul, Haji Zaharudin, Omar and he himself to be members of the conspiracy. Dato' Aziz Shamsuddin assigned to him the task of carrying out the political assassination of Dato' Seri Anwar. He further testified that Dato' Aziz Shamsuddin told him *inter alia*:

(a) to set up an office as a centre for operation to carry out the political assassination of Dato' Seri Anwar. All the expenses would be looked after by Dato' Aziz Shamsuddin.

(b) to make plans to topple Dato' Seri Anwar from becoming the Prime Minister.

(c) to topple Dato' Seri Anwar's supporters before the UMNO general assembly in 1998.

(d) not to concern himself with the book "50 Dalil Kenapa Anwar Tidak Boleh Menjadi Perdana Menteri" and the question of sodomy (liwat) as this is his (Dato' Aziz's) responsibility On this issue he was asked as follows:

Question : Apakah arahan yang diberi oleh Dato' Aziz Shamsuddin?

Answer : Dia arahkan saya sebagai seorang yang bertanggungjawab atas political assassination. Dia beri arahan kepada saya jangan masuk campur tentang Buku 50 Dalil dan tentang perkara liwat. Dia kata itu semua tanggungjawab dia.

Question : Apakah lagi arahan dan perbincangan di perjumpaan itu khasnya berkenaan dengan tuduhan liwat dan aduan liwat terhadap Dato' Seri Anwar?

Answer : Bersabit dengan perkara liwat dan aduan liwat dalam perbincangan dengan Dato' Aziz beliau mengatakan semua surat-surat dari Azizan dan Umi sebelum dihantar kepada Perdana Menteri, dia telah sken (scan) dan ubah isi kandungan surat-surat itu dan fotostat dan diedarkan kepada agen-agen dia di seluruh negara untuk memburukkan Dato' Seri Anwar Ibrahim.

It appears that the purpose of adducing this evidence is to show that Dato' Aziz Shamsuddin was responsible for the fabrication of evidence by scanning all the letters written by Umi and Azizan and by altering the contents. It was not explained which were the letters referred to but it can be inferred these were the letters written by Umi Hafilda to the Prime Minister alleging sexual misconduct on the part of Dato' Seri Anwar and the "surat akuan bersumpah" dated 5 August 1997 (P5) by Azizan. It has to be recognised and accepted that we are not concerned with the letter written by Umi Hafilda as it is irrelevant to the issue in this case. We are only concerned with P5 which contained allegations of sodomy (liwat) by Dato' Seri Anwar on Azizan. It must be appreciated that P5 was admitted only for the purpose of showing consistency of Azizan's evidence on the question of sodomy (liwat) by Dato' Seri Anwar and not as to its truth. Even assuming that the letter which was alleged to have been scanned and the contents have been altered by Dato' Aziz Shamsuddin was P5 the allegation was most improbable as the evidence of Dato' Seri Anwar shows that P5 was given to the Prime Minister by Megat Joned. There was no evidence to show that P5 was received by Dato' Aziz Shamsuddin before it reached the Prime Minister. Under these circumstances, it cannot be true

that Dato' Aziz scanned and altered the contents of P5 as he had no opportunity to do so. Even assuming that he did so the letter alleged to be altered was never produced and there was no evidence it was even shown to Raja Kamaruddin. I therefore find as a fact that P5 was never altered as alleged. If there were any other letters written by Azizan and the contents of which were altered by Dato' Aziz Shamsuddin surely the defence could have produced them at this trial. As no such letters were produced, I find as a fact that there existed no such letters. The allegation of fabricating of evidence by alterations of the contents of the letters written by Azizan cannot therefore be true and cannot be accepted. It was merely the fertile imagination of Raja Kamaruddin in a futile attempt to show there was a conspiracy to fabricate evidence.

The evidence of Raja Kamaruddin is based on what was told to him by Dato' Aziz Shamsuddin about the fabrication of evidence. Raja Kamaruddin merely told the court what Dato' Aziz Shamsuddin directed him to do but he did not say the manner how the fabrication of evidence against Dato' Seri Anwar was to be carried out. The truth of what Dato' Aziz Shamsuddin told him has not been verified as Dato' Aziz was not called as a witness. The evidence given by Raja Kamaruddin on the fabrication of evidence by Dato' Aziz Shamsuddin is therefore hearsay and not admissible.

The law on hearsay evidence has been clearly established by abundant authorities. I need refer only to *Subramaniam v. Public Prosecutor* [1956] 22 MLJ 220 where Mr. L.M.D. de Silva said at p. 222:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

Raja Kamaruddin further said in his evidence that he did not want to get involved in the alleged conspiracy to fabricate evidence. He reported to Dato' Seri Anwar about what Dato' Aziz Shamsuddin told him about the fabrication of evidence. He made a report to Dato' Seri Anwar (exh. D38A). In the report, however, he did not mention that Dato' Aziz Shamsuddin told him that he (Dato' Aziz) was involved in the conspiracy to fabricate allegation of sodomy against Dato' Seri Anwar. If it is true that Dato' Aziz told him that he was involved in the conspiracy to fabricate

evidence, such an important and serious matter would be mentioned in D38A. He had also sworn a Statutory Declaration containing details of the alleged conspiracy to fabricate evidence. I am of the opinion that Raja Kamaruddin's evidence is tailored to support the defence of fabrication of evidence advocated by Dato' Seri Anwar.

The next witness called by the defence was DSP Zull Aznam bin Haji Haron (SD15) (Zull Aznam) who was the ADC to Dato' Seri Anwar from 1997 to 1998. Zull Aznam's evidence may be summarised as follows. Azizan was brought to Dato' Seri Anwar's official residence at night on 18 August 1997 (he is not too sure of the date) by Dato' Said Awang, who was at that time Pengarah Cawangan Khas and his deputy Dato' Amir Junus. Azizan came to Dato' Seri Anwar's residence as arranged by Dato' Said Awang and Dato' Amir Junus. They met Dato' Seri Anwar for about 20 to 25 minutes. He was not present during the meeting. He did not know what was discussed by them. He sent Azizan back to his house after the meeting.

He further testified that in June 1998 (he cannot remember the exact date) he was informed by Dato' Seri Anwar's driver, Abdullah Sani that Azizan wanted an appointment to meet Dato' Seri Anwar to seek his help in connection with a tender made by one Taufik Yap Abdullah. Dato' Seri Anwar flatly refused to see Azizan and directed that Azizan could meet Encik Mohamad Ahmad, his Setiausaha Sulit Kanan at that time about the matter. He arranged for Azizan to meet Encik Mohamad Ahmad.

About a week later Azizan tried again to meet Dato' Seri Anwar. Dato' Seri Anwar was again reluctant to meet Azizan. He further said that later with reluctance Dato' Seri Anwar agreed to meet Azizan. Azizan came to Dato' Seri Anwar's house one night in June 1998. They met for about 20 minutes. He did not know what was discussed by them as he was not present at the meeting. He met Azizan as soon as Azizan came out of Dato' Seri Anwar's house after the meeting. He alleged that Azizan told him that during the meeting with Dato' Seri Anwar, Azizan denied he was involved in the production and publication of the book 50 Dalil Mengapa Anwar Tidak Boleh Menjadi Perdana Menteni. He said he asked Azizan why he wrote P5 and Azizan replied to use his own words "Dulu abang, saya dijanjikan dengan wang" and added that he had to do it as he has no choice.

At the request of Dato' Seri Anwar, Zull Aznam lodged a police report on 15 August 1997, which is Report No. 2706/97 (exh. D44). He wrote this report in the office of Dato' Said Awang in the presence of Dato' Said,

SAC1 Musa, ACP Mazlan Din and ASP Zulkifly Mohamad. He said he was told by Dato' Said Awang and SAC1 Musa what to include in the report.

In cross-examination Zull Aznam said he gave two statements under s. 112 of the Criminal Procedure Code to ASP Mazli bin Mohamad on 30 October 1998 and 4 December 1998. The learned Deputy Public Prosecutor, Dato' Azhar indicated to the court his desire to impeach this witness. A copy of the statement was shown to me. At p. 20 the witness stated "Saya juga tidak tahu menahu apa yang dibincangkan oleh mereka berdua". I then pointed out to the learned Deputy Public Prosecutor there is nothing inconsistent with this to the oral evidence he had given in this court. The learned Deputy Public Prosecutor did not proceed with the impeachment of this witness.

Zull Aznam was further asked in cross-examination why he did not lodge a police report when Azizan told him that he was promised money and that was why he made allegations against Dato' Seri Anwar. He explained he did not make a police report because he was not sure of the truth of what Azizan had told him. He agreed that what Azizan told him was very serious and it amounts to corruption. He said he did not ask Azizan who promised him to give the money. He said he gave another statement under s. 112 of the Criminal Procedure Code to ASP Mazli bin Mohamad on 4 December 1998 and one statement earlier also under the same section to ASP Zulkifly Mohamad on 2 July 1998. He admitted that in his statements to the police, he never mentioned that Azizan told him he made allegations against Dato' Seri Anwar because he was promised money (dijanjikan dengan wang). He said he knew Azizan was arrested before 18 August l997. He confirmed that on 2 September 1997 SAC1 Musa requested him to contact the witnesses in connection with the report (D44) which he had lodged and that SAC1 Musa informed him he wanted to record a statement from him under s. 112 of the Criminal Procedure Code. He informed Dato' Seri Anwar about SAC1 Musa's request. He also testified that SAC1 Musa came to see Dato' Seri Anwar at the latter's office at about 11am on the same day. He said no statement was taken from him in connection with D44. In the report he mentioned about a letter entitled "Talqin Terbuka Untuk Anwar Ibrahim" (IDD 21) which was given to him by one of the staff in Dato' Seri Anwar's office. In re-examination Zull Aznam explained he did not state in any of his statement to the police that Azizan told him he was promised money because he was not asked about this.

It is the case for the defence that Azizan admitted to Zull Aznam that he made the allegation of sodomy against Dato' Seri Anwar in return for money. It was submitted by En. Fernando, the leading counsel for Dato'

Seri Anwar that Zull Aznam's evidence taken in isolation is enough for the court to acquit both the accused. He urged the court to accept the evidence of Zull Aznam as he is a witness of truth.

In assessing Zull Aznam's evidence the court must also consider the evidence of Azizan on the same issue namely whether he told Zull Aznam he made the allegations against Dato' Seri Anwar in return for money. When giving evidence Azizan said he did not meet Zull Aznam after he had met Dato' Seri Anwar. He was asked in cross-examination:

Question : Adakah kamu menjumpai dia selepas awak menemui Dato' Seri Anwar?

Answer : Tidak ada.

Question : Adakah kamu jumpai dia sebelum kamu menemui Dato' Seri Anwar pada occasion itu?

Answer : Ada.

Azizan further denied that he manufactured (mereka-reka) the story of liwat because of money. He was asked:

Question : Adakah kamu memberitahu beliau bahawa kamu merekakan perkara ini untuk wang?

Answer : Tidak.

Question : Saya katakan kepada kamu, kamu memberitahu ASP Zull Aznam bahawa kamu mereka-reka perkara ini kerana kamu dijanjikan wang?

Answer : Tidak setuju.

It is clear that there are two versions in respect of the issue whether Azizan told Zull Aznam that he manufactured (mereka-reka) the story of liwat because of money. According to Azizan he never told this to Zull Aznam whilst the latter said that Azizan told him this after he met Dato' Seri Anwar at the end of June 1998. It is interesting to note that Dato' Seri Anwar said in his evidence Zull Aznam told him in 1997 that:

> Selepas Azizan berjumpa saya memohon maaf dan menyatakan kalau beliau membuat tuduhan seperti itu beliau gunakan istilah "Murtad" dan bila beliau keluar dari rumah bersama Zull Aznam beliau memberitahu Zull Aznam terdapat faedah atau keuntungan yang melibatkan beliau terlanjur membuat dakwaan atas desakan Umi Hafilda.

This evidence of Dato' Seri Anwar contradicts what Zull Aznam said that is Azizan told him this after the meeting with Dato' Seri Anwar at the end of June 1998. This contradiction has not been explained: Under these circumstances and in view of the evidence of Azizan denying he did not meet Zull Aznam after his meeting with Dato' Seri Anwar at the end of June 1998 and denying he ever told Zull Aznam that he was promised money to make the allegations of sodomy against Dato' Seri Anwar and looking at Zull Aznam's evidence as a whole, I am inclined to the conclusion that Zull Aznam's testimony is suspect. I have to treat his evidence with caution. My conclusion is further fortified by the fact that if Azizan did confess to Zull Aznam that he was promised money to fabricate evidence surely one would expect Zull Aznam would tell Dato' Seri Anwar about this who would be expected to report this matter to the police so that an investigation could have been conducted or for that matter Zull Aznam himself should have lodged a police report as the alleged admission of Azizan that he made the allegations of sodomy against Dato' Seri Anwar because of money as claimed by Zull Aznam is very material to the defence. If it is true that Azizan was paid for making the allegations that would create a doubt in the prosecution case. Zull Aznam explained that he did not lodge a police report on what Azizan was alleged to have told him because he was not sure whether what Azizan told him was true. I find it very difficult to accept this explanation because as a senior police officer it would be beyond comprehension that he would not take further action on this matter. The least expected of him was to lodge a police report. Another point to be noted is that Zull Aznam never mentioned to ASP Mazli and ACP Zulkifly about what Azizan told him. On the evidence as a whole, I find as a fact that Azizan did not tell Zull Aznam that he made the allegations of sodomy against Dato' Seri Anwar because of money. I therefore attach no weight to Zull Aznam's evidence on this issue.

The defence also called Ma'amin bin Latip (SD18) to give evidence. The gist of his evidence is that Azizan told him that he was never sodomised by Dato' Seri Anwar. He testified that he was introduced to Azizan by Abdul Rahim bin Dahalan (Rahim King). Rahim King told Ma'amin, "Awak tengok-tengoklah dia kawan lama saya. Dia tidak ada saudara-mara di Melaka". He admitted that Rahim King gave him some money but denied that he was paid to keep an eye on Azizan. He said Rahim King gave him the money to assist him because his son was ill at that time. He admitted that he did go with Abdul Rahim to accompany Azizan to a lawyer's office at Jalan Masjid India twice. He confirmed that Rahim King asked Azizan to make a statutory declaration.

He further testified that Azizan told him that he (Azizan) was defamed (difitnahkah) in the book 50 Dalil *inter alia* that he was sodomised by Dato' Seri Anwar. Azizan was not asked about this when he gave evidence. Azizan referred to Ma'amin but said he only told him he wanted to start a new life and nothing more. He did not mention about sodomy at all. For this reason I rule that Ma'amin's evidence on this issue is hearsay as the purpose of introducing the evidence is to establish the truth of what was alleged to have been said by Azizan to Ma'amin. I therefore find that the evidence of Ma'amin is worthless as it does not establish the fact that Azizan made an admission to Ma'amin that he was not sodomised by Dato' Seri Anwar.

The next evidence to be considered is that of Abdullah Sani bin Said (SD17) who at the material time was the driver of Dato' Seri Anwar since 1983. Azizan is his close friend. In June 1998 Azizan came to visit him in his house as he had met with an accident. He testified that Azizan told him he wanted to see Dato' Seri Anwar Ibrahim. Abdullah Sani informed Zull Aznam (SD15) who finally arranged for Azizan to meet him. Abdullah Sani asked Azizan about the sodomy (liwat). In answer Azizan denied he was sodomised by Dato' Seri Anwar to quote Abdullah Sani's own words "Dia menafikan yang dia diliwat".

Encik Gurubachan submitted that the evidence of this witness corroborates Zull Aznam's evidence that Azizan wanted to see Dato' Seri Anwar in June 1998. It was also submitted that the conduct of Azizan is contrary to the allegation of sodomy and is consistent with the innocence of Dato' Seri Anwar. It was also submitted that if a person is a victim of sodomy, he would not want to have anything to do with Dato' Seri Anwar.

This submission to my mind is a simpliciter and the fact that Azizan went to see Dato' Seri Anwar does not mean that he was not sodomised. He went there for other purposes. It is in evidence when he met Dato' Seri Anwar that they discussed about the death of Azizan's wife and Azizan said he did not accuse Dato' Seri Anwar was involved as his wife died as a result of an accident. Dato' Seri Anwar asked him to deny his allegations he had made against the former if the police asked him about it. On the facts and evidence of this case, it cannot be said with honesty that the conduct of Azizan in visiting Dato' Seri Anwar is contrary to the allegation of sodomy. He went there for a purpose which had been mentioned earlier.

It is not in dispute that Azizan went to see Dato' Seri Anwar in June 1998 and this evidence is acceptable. The importance of the evidence of this witness is in respect of the alleged admission of Azizan that he told the witness he was not sodomised by Dato' Seri Anwar. It has to be observed

that some of the witnesses for the defence notably Zull Aznam, Ma'amin and this witness gave evidence to the effect that Azizan had told them he was not sodomised. Azizan denied that he ever told these witnesses that he was not sodomised. The evidence of Abdullah Sani on the issue whether Azizan told him he was not sodomised by Dato' Seri Anwar is hearsay. The truth of what Azizan is alleged to have said to Abdullah Sani has not been verified as Azizan was never asked on this issue. In cross-examination, he admitted that he said in the earlier trial of Dato' Seri Anwar when he gave evidence that Azizan never told him about his problem and that Azizan only spoke to him over the phone and he did not know whether Azizan contacted Zull Aznam. In the present case, he testified that Azizan not only spoke to him, but visited him in his house as he was sick. The evidence of Abdullah Sani is suspect under these circumstances. I am inclined to believe that the evidence of Abdullah Sani was tailored to accommodate the defence of conspiracy to fabricate evidence especially by Azizan. I therefore attach no weight to his evidence.

Now I shall deal with the evidence of the next witness Jamal Abder Rahman (SD 19), the owner of a limousine company in Washington. He testified that at the material time he had a contract with the Malaysian Embassy in Washington to provide limousine services to visiting VIPs including royalties from Malaysia. He further said that he met a Malaysian Diplomat in Washington by the name of Mustapha Ong. Sometime in 1998 he drove this diplomat to New York. During the journey Mustapha Ong asked him whether Dato' Seri Anwar had made any sexual passes on him. He alleged that Mustapha Ong further said "If you say that he made passes on me we will make money". Mustapha Ong also said "Why don't you say that you brought some girls and boys to him so that we can get money". He was very upset on hearing what Mustapha Ong said to him.

He dropped Mustapha Ong at a Malaysian diplomat's house at the 1st Street, on the East side. The Malaysian diplomat came out and met them. He handed a booklet to Mustapha Ong who asked him (Jamal) to sign and Mustapha Ong said "Why don't you sign this and we can make up to US$200,000." He did not sign the booklet and retorted "You change the name from Jamal to Mustapha Ong and say that Anwar Ibrahim make sexual passes at you, made love to you, say anything and you make the money. Have a good day".

He then left New York for Washington. On arrival at Washington D.C., he went straight to see Dato' Dali who was then the Malaysian Ambassador in Washington. He told Dato' Dali exactly what transpired between Mustapha Ong and him during the journey to New York. Dato' Dali was very furious and assured Jamal that neither he himself (Dato' Dali) nor

the Malaysian Embassy has anything to do with it. Three months later Jamal went to see a friend of Dato' Seri Anwar by the name of Sheikh Taha who was at that time the President of the Islamic University in Northern Virginia. He told Sheikh Taha what transpired between Mustapha Ong and him. He was advised to make an affidavit which he did. He did not know what happened to the affidavit after that.

It was submitted by En. Fernando the evidence of Jamal Abder Rahman is relevant to show the level and intensity of efforts made to procure fabricated evidence against Dato' Seri Anwar. This effort went even beyond the shores of Malaysia in the United States and the perpetrators are Malaysians.

It is to be noted that the evidence of Jamal Abder Rahman in substance is that he was asked to fabricate evidence by Mustapha Ong for a reward. He refused to do so. The evidence of this witness, if true, would show only an attempt by Mustapha Ong to procure fabricated evidence by using Jamal Abder Rahman. There was in fact no fabrication of evidence. In any event the evidence of Jamal Abder Rahman is hearsay as regards the truth as Mustapha Ong was not called despite the assurance by En. Fernando he would be called. I am aware that no adverse inference can be drawn against the defence for failure to call a witness. There is no duty on the defence to call any evidence for all he has to do is to raise a reasonable doubt: see *Goh Ah Yew v. Public Prosecutor* [1949] MLJ 150. In *Lim Kah Wan v. Public Prosecutor* [1985] 2 CLJ 473 Edgar Joseph J (as he then was) stated the law with regards to adverse inference to be drawn against the accused at p. 477 as follows:

> Accordingly, no adverse inference can be drawn against an accused person by reason of his failure to call any witness. However, the failure to call any particular witness is a matter which the court may take into account in assessing the weight of evidence without drawing any adverse inference especially so when the potential witnesses were persons in respect of whom the prosecution had no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence. *Regina v. Gallagher* [1974] 1 WLR 1204; *PP v. Lim Kuan Hock* [1967] 2 MLJ 114, 115; *Tay Choo Wah v. PP* [1976] 2 MLJ 95, 100.

In this case the defence is relying on the truth of what was said by Jamal Abder Rahman. In his evidence this witness narrated what Mustapha Ong allegedly told him. In other words, he testified on matters asserted out of court. It is incumbent upon the defence to adduce evidence by calling Mustapha Ong. For this reason no reliance can be placed on the evidence of this witness. I therefore ignored the evidence in connection with the fabrication of evidence.

The defences next witness is Mohd. Azmin bin Ali (SD21) who was the former private secretary of Dato' Seri Anwar until 2 September, 1998. He gave lengthy evidence on various topics and spent a lot of time in giving evidence about his relationship with his sister Umi Hafilda (Umi) and Umi's character. He said, *inter alia*, that Umi was disowned by her father on various grounds. I cautioned the defence counsel to adduce only relevant evidence. Despite this observation, questions were still asked by the defence counsel about Umi's activities, particularly about her relationship with a married man and her trip to London with Dato' Sng and others, the disowning of her by her father. I am of the view that the evidence is irrelevant to the issue before this court. The evidence of Azmin shows that Umi had problems with the members of her family and these problems as highlighted by Azmin in his evidence are not the issues relevant in this trial. This proceeding is not to be treated as a forum to settle their family disputes.

The part of his testimony relating to the role played by Umi in the conspiracy to fabricate evidence against Dato' Seri Anwar would be relevant. He testified that he met Dato' Said Awang who was at that time Ketua Cawangan Khas at his office at about 8.45am on 11 August 1997. Dato' Said Awang came to see Dato' Seri Anwar. Before seeing Dato' Seri Anwar, Dato' Said Awang had a conversation with him. Azmin said Dato' Said Awang asked him to speak to Umi and ask her to retract the allegations she had made against Dato' Seri Anwar. Azmin responded that he could not do that as he was not on talking terms with Umi. Subsequently about a year later, he met Umi at his brother's house in Subang. At that meeting Umi told him that she did not write the letter containing allegations of sexual misconduct against Dato' Seri Anwar which was circulated throughout the country. A few days later, he met Umi for the second time at Dato' Sng Chee Hua's office in Jalan Sultan Ismail, Kuala Lumpur. At this meeting, Azmin said Umi again repeatedly said she did not write the letter and further told him that she was promised money and contracts to fabricate evidence. He gave her a brotherly advice to stay away from the conspiracy but she told him that she cannot do that as some money has already been paid to her. Three days later, Azmin met Umi for the third time at restaurant Sri Melayu, Kuala Lumpur. At that meeting Umi repeated what she had said to him earlier and told him not to worry about her involvement because ASP Rodwan told her that Dato' Seri Anwar will be charged in court and he will be dismissed from the government and party posts.

In cross-examination Azmin was not shaken and stood to his evidence that Umi admitted she did not write the letter that was circulated and that she was paid to fabricate evidence. She also showed him her statutory declaration (D27). This is irrelevant to the issue before this court because the charge is based on the allegation of sodomy made by Azizan as stated in the charge.

The evidence given by Azmin is hearsay as it is based on what Umi told him and Umi was never called to testify even though she was offered by the prosecution. In any event Umi's evidence whether she wrote the letter containing allegation of sexual misconduct against Dato' Seri Anwar is irrelevant.

Azmin also testified that he was arrested on 19 September 1998. Azmin alleged that he was interrogated by six police officers after his arrest and was badly treated. He said he was stripped naked by the police and a photograph of his private part was taken. He was forced by the police to admit that he was sodomised by Dato' Seri Anwar. In introducing this evidence, the purpose is obviously to show that there was an attempt by the police to ask Azmin to fabricate evidence against Dato' Seri Anwar. No evidence was adduced to establish that the police interrogators asked Azmin as what was alleged. Azmin did not mention the name of even one of them and more importantly identify them, leave alone calling them to testify. The evidence is hearsay. In any event, the evidence is irrelevant as it has no nexus with the fabrication of evidence against Dato' Seri Anwar in respect of the alleged sodomy on Azizan.

The last point to note as regards Umi is her statutory declaration (exh. D27). It was pointed by En. Fernando that Umi confessed to Azmin that she was not the writer of exh. P5. She denied that she has anything to do with the circulation of the letter which was alleged to be written by her to the Prime Minister. She also said that she is not the originator of the "surat layang" and has no idea of the identity of the person or persons behind it. This is clearly stated in exh. D27.

It is to be observed that this statutory declaration has not in fact been proved. It was put in for identification only through En. Ngui Kee Heong (SD23), a Commissioner for Oaths. It is therefore not exhibited in the strict sense and cannot therefore form part of the record in this case: See *Public Prosecutor v. Datuk Haji Harun bin Haji Idris and Ors* [1977] 1 MLJ 180. The circumstances under which D27 was made are not disclosed as the maker has not been called to give evidence and to be cross-examined as to the truth of its contents. The contents of D27 is therefore hearsay. A statutory declaration is not a public document and it does not attract s. 35

or s. 74 of the Evidence Act 1950. In *Sim Tiew Bee v. Public Prosecutor* [1973] 2 MLJ 200 it was held that a ship's manifest made in compliance with s. 52 of the Customs Act was held to be a private document and therefore the maker must be called to produce it. By analogy, I am of the view that a statutory declaration made under s. 2 of the Statutory Declarations Act 1960 does not make it a public document. As D27 has not been proved and properly admitted as such I disregard it completely and attach no weight on it at all.

In the premises it is my finding that Azmin's evidence has not established that there was a conspiracy to fabricate evidence against Dato' Seri Anwar involving Umi.

The next witness called to testify on behalf of Dato' Seri Anwar was Nurazman bin Abdullah @ Beginda (SD28). His testimony is focussed on what Umi told him. He said Umi told him, *inter alia*, that she forced Azizan to admit that he was sodomised by Dato' Seri Anwar, that if Dato' Seri Anwar was toppled she would be given by Tun Daim an "advertisement" project at Sepang Airport worth RM10 million, that the allegation of sodomy against Dato' Seri Anwar was fabricated (direka-reka), that Dato' Aziz Shamsuddin requested 40 copies of the book 50 Dalil Kenapa Anwar Tidak Boleh Menjadi Perdana Menteri from her and that the contents of the book 50 Dalil was fabricated (direka) by Khalid Jefri to topple Dato' Seri Anwar. He further said Umi also told him that Dato' Tunku Adnan, Tun Daim, Tan Sri Rahim Thamby Chik were involved in fabricating (mereka-reka) the allegation of sodomy against Dato' Seri Anwar as stated in the book 50 Dalil.

It is indeed puzzling to note that Umi was not called to testify. The evidence of Nurazman is therefore inadmissible being hearsay and I therefore disregard it completely.

The defence called Dato' Shafee bin Yahaya (SD30) to testify. According to En. Karpal Singh, one of the counsels for Dato' Seri Anwar, the purpose of calling this witness is to give evidence to show that bad blood existed between Dato' Seri Dr. Mahathir and Dato' Seri Anwar Ibrahim arising out of the raid of the office of the Director General of the Economic Planning Unit by the Anti Corruption Agency.

Dato' Shafee who was the Director General of the Anti Corruption Agency until his retirement on 12 September 1998 testified, *inter alia*, that he raided the office of the Ketua Pengarah EPU (Economic Planning Unit) in the Prime Minister's Department. He raided the office as a result of a complain made by an aggrieved party. He further said that he was called

up by the Prime Minister. He was scolded by him and he was taken aback. He also said that the Prime Minister asked him to close the case. I asked En. Fernando of the relevancy of this line of questioning. His explanation was that he was trying to adduce evidence of circumstances which led to fabricating of evidence. The further testimony of this witness shows that he informed Dato' Seri Anwar of the complaint against the Director General of the EPU and of his intention to raid the office of the Director General. Dato' Seri Anwar asked him "Have you cleared this with the PM?" He replied, "I mentioned this to PM, but he kept quiet."

Dato' Shafee again said in cross-examination that the Prime Minister kept quiet when he was informed of the intention of the Anti Corruption Agency to raid the office of the Director General. The evidence goes this way:

Question : Apabila kamu memberitahu PM berkenaan niat kamu untuk mengeledah pejabat DG EPU, apakah PM berkata kepada kamu?

Answer : Pada ingatan saya waktu saya jumpa PM adalah berkaitan tajuk dengan perkara lain dan perkara EPU ini adalah di antara perkara yang disebutkan.

Question : Apabila pertama kali kamu berjumpa PM untuk memberitahu niat kamu untuk mengeledah pejabat Ketua Pengarah EPU, PM hanya berdiam?

Answer : Betul.

It is clear from these questions and answers that the Prime Minister just kept quiet when he was told by Dato' Shafee about the impending raid of the office of the Director General. If it is true that the Prime Minister was not happy with the raid, surely he would have told Dato' Shafee not to proceed with the raid. Under these circumstances, I am of the view that it is absurd and incredible to believe that the Prime Minister scolded Dato' Shafee for the raid and asked him to close the case. I am also of the view that Dato' Shafee said this merely to create an adverse impression on the Prime Minister that he interfered with the work of the Anti Corruption Agency. Even assuming that the PM was unhappy with the raid of the office of the Director General of the EPU, it cannot amount to circumstantial evidence without other relevant and admissible evidence being adduced, to show there could have been fabrication of evidence involving the Prime Minister. There must be evidence to show that the Prime Minister did in fact participate in the conspiracy to fabricate evidence against Dato' Seri Anwar. There is none on this particular issue. The result is that I find that the evidence of Dato' Shafee does not establish that the Prime Minister was involved in the alleged conspiracy to fabricate evidence.

The last witness called on behalf of Dato' Seri Anwar in the attempt to establish conspiracy to fabricate evidence is En. Manjeet Singh Dhillon (SD31). He was the defence counsel for Dato' Nallakaruppan s/o Sollaimalai in Kuala Lumpur High Court Criminal Trial No.45-40-1998 wherein Dato' Nallakaruppan was charged for an offence under the Internal Security Act 1960. Encik Manjeet Singh Dhillon informed the court that he has the expressed consent of his client to give evidence in court as required under s. 126 of the Evidence Act 1950. The evidence given by this witness can be briefly summarised as follows. On 2 October 1998 he had a meeting with Dato' Abdul Gani in the latter's Chambers. At the meeting he said Dato' Abdul Gani wanted his client to give evidence implicating Dato' Seri Anwar with non-existent women. His client refused to co-operate because in doing so his client would be lying. He referred to an affidavit affirmed on 25 August 1998 by Dato' Nallakaruppan (exh. D54). The affidavit states how he was treated while he was under detention and about the interrogation carried out by the police. The affidavit contains matters which are not relevant to the issue before this court. In any event, the affidavit has not been properly produced in court as an exhibit on the principle laid down in *Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 and *Sim Tiew Bee v. Public Prosecutor* [1973] 2 MLJ 200. I therefore ignore the affidavit. For the same reasons, I also disregard the Statutory Declaration of Dr. Munawar Ahmad Anees dated 7 November 1998 (D53).

En. Manjeet Singh also referred to his Statutory Declaration dated 9 November 1998. The statutory declaration contains details of his discussion with the Attorney-General and his officers Dato' Azahar and Dato' Abdul Gani on the issue of reducing the charge against his client Dato' Nallakaruppan. On close scrutiny, I find that the statutory declaration does not mention anything about the fabrication of evidence against Dato' Seri Anwar in respect of the sodomy (liwat) alleged to have been committed by Dato' Seri Anwar on Azizan which is the subject matter of the charge. I fail to see the relevance of what is stated in En. Manjeet Singh's statutory declaration. The result is that I do not rely on the statutory declaration.

On the evidence adduced through the witness called on behalf of Dato' Seri Anwar, I am satisfied and find that the defence of conspiracy to fabricate evidence against Dato' Seri Anwar has not been substantiated. The defence of conspiracy to fabricate evidence therefore fails.

*(4) Reviewing Of Rulings*

In their submission at the end of the case for the defence the learned defence counsels urged the court to review the rulings earlier made at the end of the case for the prosecution which are firstly that the confession

of Sukma was admissible and secondly that the credibility of Azizan was saved and therefore he was a reliable and truthful witness.

*(a) Reviewing Of Admissibility Of Sukma's Confession*

The confession made by Sukma was admitted in evidence after a trial-within-a trial was held. At the end of the trial I made a ruling that the confession was voluntary and admissible. It was admitted in evidence and marked P4.

The learned defence counsel also urged the court to reconsider this ruling. This point is also raised again on behalf of Sukma. I shall deal with this point in detail later. For the time being it is sufficient for me to say that the ruling I had made still stand for the reasons which will appear later in this judgment when I consider the defence of Sukma.

*(b) Reviewing Of Azizan's Credibility*

It is to be noted that I have dealt with this issue at length at the end of the case for the prosecution. Encik Fernando, the leading counsel for Dato' Seri Anwar raised this issue again. In the light of certain evidence that was adduced in the defence case the credibility of Azizan requires further consideration.

Zull Aznam (SD15) testified that Azizan told him that he (Azizan) made the allegations against Dato' Seri Anwar because he was promised money. Azizan was not asked in cross-examination about this. It is beyond comprehension if Azizan said this to Zull Aznam surely one would expect Zull Aznam would lodge a report or at least inform Dato' Seri Anwar about this. Dato' Seri Anwar in his evidence said that Azizan told Zull Aznam about this when they met in 1997. But Zull Aznam contradicted this when he said this conversation between Azizan and himself when Azizan was alleged to have said he made the allegation against Dato' Seri Anwar because of money took place in June 1998. This contradiction cannot be reconciled. I am inclined to believe that the conversation between Zull Aznam and Azizan never took place and I am convinced Azizan never told Zull Aznam that he made allegations against Dato' Seri Anwar because he was promised money. The alleged conversation under the circumstances is the brainchild of Zull Aznam to suit the defence. The evidence of Abdullah Sani (SD17) is to the effect that Azizan told him sometime in June 1998 that he was never sodomised by Dato' Seri Anwar. Azizan was never asked in cross-examination about this. The evidence of this witness is hearsay. Further Abdullah Sani is not truthful as he admitted in cross-examination upon being confronted with his earlier evidence in the previous trial of Dato' Seri Anwar that Azizan never told him his problems. In

addition to this in the earlier trial of Dato' Seri Anwar he said Azizan spoke to him over the phone and he did not know whether Azizan contacted Zull Aznam. However, in the present trial he said he met Azizan in his house. This contradiction in his evidence casts suspicion on his credibility and I attach no weight to his evidence. Thus this witness also tailored his evidence to accommodate the defence. As a result, I find that Azizan's credibility remains intact.

Norazman bin Abdullah (SD28) testified that Umi told him that she was the one who forced Azizan to allege that he was sodomised by Dato' Seri Anwar. This evidence is hearsay as Umi was never called to testify on this issue. In any event Azizan denied that Umi forced him to allege that Dato' Seri Anwar sodomised him.

As regards exh. D26, Akuan Bersumpah oleh Azizan, this was not produced through Azizan. The circumstances under which this exhibit was made by Azizan are never disclosed. The contents are inadmissible as it was not properly produced through the maker. I therefore attached no weight to it.

Exhibit D23, Kenyataan Umum oleh Azizan was also not properly produced through the maker. Azizan was never asked about D23 when he was cross-examined. I therefore ignore D23 and I do not refer to it at all.

He further submitted that Azizan is a totally unreliable and indeed a lying witness. He stressed that the court had made adverse observations on the demeanour of this witness when he testified and this affects his credibility. I therefore rule that on the evidence adduced by the defence that I have referred to above that the credibility of Azizan remains unaffected.

It was also urged by the learned counsel that I should reconsider the impeachment proceedings against Azizan. I had earlier dismissed the application by the defence to impeach Azizan based on the contradictions between the statement he gave in the previous trial where Dato' Seri Anwar was tried for offences of corrupt practice punishable under s. 2(1) Emergency (Essential Powers) Ordinance No. 22/1970 and the statement he gave in this trial. To recollect the relevant statements are as follows:

(a) In the previous trial he said in cross-examination:

> Saya setuju bahawa Dato' Seri Anwar tidak meliwat saya sebab itulah saya masih pergi ke rumahnya antara tahun 1992 dan 1997. Kalau tidak saya tentu menjauhkan diri dari rumahnya.

(b) In re-examination he said:

> Selepas bulan sembilan 1992 sehingga sekarang tertuduh tidak meliwat saya.

(c) In the present trial he testified that he was sodomised between the months of January to March 1993.

I dismissed the application to impeach as I was satisfied that Azizan has successfully explained the discrepancies which I accepted hence my ruling that his credit was saved. The defence counsel's submission at this stage is clearly a mere repetition of his earlier submission at the end of the case for the prosecution. I find there is no additional and fresh evidence adduced on which a review of my earlier ruling could be made. Therefore the submission deserves no further consideration at all. My earlier ruling that Azizan's credibility is saved stands.

*(5) False And Fabricated Charge*

It is contended by the defence that the charge against Dato' Seri Anwar is fabricated in that the prosecution amended the charge twice. I had dealt with this issue at length earlier in this judgment and ruled that the contention that the charge against Dato' Seri Anwar is false and fabricated is without any basis. This point was raised again by Encik Fernando.

He submitted that the court has to analyse the evidence given by Azizan in respect of the dates stated in the charge which was amended twice. It is pertinent to note that Azizan said in his cross-examination that he did not tell the police he was sodomised in 1992 and in respect of 1994 at first he said he cannot remember whether he told the police he was sodomised in May 1994. About six days later during cross-examination he was again asked about the year 1994. It went this way from my record:

> Soalan : Adakah awak beritahu pihak polis kamu diliwat oleh Dato' Seri Anwar dan bukan dalam tahun 1994?
>
> Jawapan : Ada.
>
> Soalan : Adakah tidak sebelum hari ini awak ada memberitahu Mahkamah ini bahawa awak tidak ada memberitahu polis bahawa awak diliwat oleh Dato' Seri Anwar dan Sukma pada tahun 1994?
>
> Jawapan : Ada.

It is clear from the answers given by Azizan that he told the police he was sodomised by Dato' Seri Anwar but not in 1994 and that he told this court that he did not tell the police he was sodomised by Dato' Seri Anwar

and Sukma in 1994. It is important to note that the charges against Sukma right from the beginning never mentioned 1994. The charges against him stated May 1992 which was subsequently amended to read between January to March 1993. The year 1994 only appeared in the original charge against Dato' Seri Anwar. The charge was subsequently amended twice in respect of the year. Azizan testified that he cannot remember whether he told the police that he was sodomised in 1994. He said he was confused. I have dealt with this aspect of the evidence earlier. Encik Fernando again advanced the argument that since Azizan did not tell the police he was sodomised in 1994 and 1992 then someone must have told the police that he was sodomised in 1994 and 1992 that occasioned the first amendment of the charge. Since this is not explained, the first amendment that is in respect of the date from 1994 to 1992 the result is that the charge as amended is a fabricated charge. With the greatest respect, I must say this submission is a mere repetition of the submission made by him earlier at the end of the case for the prosecution. I find no new or fresh evidence was adduced by the defence witnesses on this issue. I therefore rule that this submission is baseless and nothing further need be said about it.

As regards the amendment of the charge in respect of the date from May 1992 to between the months of January to March 1993, it was made as a result of Azizan's statement taken by SAC1 Musa on 1 June 1999. As what I had said earlier in this judgment the prosecution has the right to amend the charge under the law based on the evidence as revealed by the investigation carried out by the police as a result of the police report, Dang Wangi Report No: 14140/99 lodged by Mohd. Azmin bin Ali. The investigation was carried out by SAC1 Musa in 1998, which was the second investigation, in respect of the book entitled "50 Dalil Kenapa Anwar Tidak Boleh Menjadi Perdana Menteri". The result of this second investigation occasioned the final amendment of the charge as it stands today. Whether the charge is false and fabricated is a question to be determined on the facts on evidence adduced in this case. To sustain a conviction against both the accused, the prosecution has to prove its case beyond a reasonable doubt against them which I shall deal with later in this judgment.

*(6) Corroboration*

The defence counsel also submitted on the issue of corroboration which submission is substantially the same as what was submitted earlier at the end of the case for the prosecution. I find that the submission is a mere repetition and there is no basis for me to alter my finding on the issue of corroboration. My finding that there was corroboration with regard to Azizan's evidence stands.

The last issue that needs to be considered is the statements made by the Prime Minister and the former Inspector General of Police in connection with the various allegations of sexual scandals against Dato' Seri Anwar.

*(7) Press Statements In The Newspaper*

It was also the contention of the defence that the allegations of sexual misconduct against Dato' Seri Anwar which surfaced in 1997 were dismissed by the Prime Minister as ridiculous, slanderous and made with political motive. The defence tendered in evidence newspaper reports containing public statements made by the Prime Minister and the Inspector General of Police at that time. These reports are as follows:

*Exhibit D14:*

This is a press statement by the Prime Minister in the Mingguan Malaysia dated 31 August 1997. He expressed his opinion that penyebar pelbagai khabar angin, termasuk mengenai perletakan jawatan Menteri Kewangan "sebenarnya patut ditembak".

*Exhibit D18:*

This is a press statement dated 3 September 1993 in the New Straits Times by the then Inspector General of Police. He said that police investigation into two letters alleging sexual scandal involving Deputy Prime Minister Anwar Ibrahim found the charges to be untrue.

*Exhibit D41:*

This is a report prepared by Sivabalan (SD8) who was a reporter with Bernama at the material time. The report dated 24 August 1997 was entitled "Mahathir – Anwar No truth in letter alleging Anwar's involvement in Sex Scandal". This report was based on a statement by the Prime Minister at a press conference. He said that there was an attempt to sabotage Anwar's image through allegations that Anwar was involved in a scandal. He also said that the allegations against Anwar are ridiculous based on a report he had received. He also said the case is closed after police investigation.

*Exhibit D42:*

This is a press statement entitled "Fitnah Anwar bermotif politik – PM" which appeared in the Utusan Malaysia dated 25 August 1997 by the Prime Minister. He said that the allegations against Dato' Seri Anwar are slanderous with a political motive – ("merupakan fitnah yang bermotifkan politik").

The reporters who wrote the reports and were present at the various press conferences were called to testify. The newspaper reports described above are admissible in evidence to prove their contents as the reporters in whose

presence the statements were made were called to give evidence (see *Khilumal v. Arjundas* AIR [1959] Raj 280, *Laxmi Raj Shetty v. State of Tamil Nadu* AIR [1988] SC 1274 referred to in *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No. 3)* [1999] 2 CLJ 215).

These press statements by the Prime Minister and the then Inspector General of Police were based on the police investigation carried out in 1997 in connection with police report No. 2706/97 (exh. 44).

The gist of these press statements is that the allegations and accusations against Dato' Seri Anwar that he was involved in sex scandals were slanderous and untrue. The police had investigated the matter and had concluded that there was no case.

SAC1 Musa in his evidence stated that the investigation which was referred to in these press statements was incomplete as Dato' Seri Anwar told him to stop the investigation because he has been cleared by the Prime Minister.

With all humility, I am of the view that these press statements have no connection with the charges on which Dato' Seri Anwar is being tried. They are irrelevant. The charge against Dato' Seri Anwar was brought about as a result of a second investigation carried out by the police in respect of Dang Wangi Report No. 14140/98 lodged by Mohamed Azmin bin Ali on 19 June 1998. The court has to decide on the charge according to the evidence adduced in court and nothing else. The press statements cannot be regarded as evidence in this trial, as they are, as what I said, irrelevant.

**Sukma's Defence**

Sukma himself gave evidence on oath and called a number of witnesses to testify on his behalf to support his defence. One of the witnesses which was required by the defence was Dato' Seri Dr. Mahathir bin Mohamad (Dr. Mahathir), the Prime Minister. A subpoena had been served on him: The prosecution objected orally to the calling of Dr. Mahathir as a witness and invited the court to make a ruling under s. 136(1) of the Evidence Act 1950 whether Dr. Mahathir ought to attend court to give evidence.

I shall now deal with this objection briefly. I have considered this issue carefully and have made a ruling on this objection after hearing counsels for both the accused and the prosecution and after considering the affidavit evidence contained in affidavits filed by Dato' Seri Anwar, Sukma and Dr. Mahathir. The ruling was that the subpoena which had been served on Dr. Mahathir was set aside and that accordingly Dr. Mahathir need not attend court to testify on behalf of the defence. The reasons for the ruling are

stated in my written judgment dated 21 April 2000 which for convenience is attached as an "Appendix" to this judgment. It is not necessary for me to repeat the reasons here but it is sufficient to state that the ruling was made because I was satisfied that Dr. Mahathir would not be able to give relevant evidence in his testimony to assist both the accused in their defence. As the evidence to be given by Dr. Mahathir would not be relevant the ruling that Dr. Mahathir need not appear in court to testify does not in any way prejudice both the accused.

Sukma's defence briefly relates to:

(a) Alibi;

(b) the offences against him could not have been committed as alleged due to the renovation of his apartment;

(c) there was no mattress and therefore it was not possible for him to commit the act of sodomy;

(d) the review of the admissibility of his confession;

(e) the review of Azizan's credibility; and

(f) the lack of corroboration.

I shall now consider the evidence adduced by the defence.

*(a) The Alibi*

I have already stated the law relating to alibi in an earlier part of this judgment when I dealt with the evidence of alibi of Dato' Seri Anwar. It is to be recognised that the whereabouts of Dato' Seri Anwar between January and March 1993 is important and relevant to the defence of Sukma in the sense that the alibi of Dato' Seri Anwar for the period if accepted by the court then the charges against both the accused would undoubtedly fail.

As what I had stated, I accepted the alibi of Dato' Seri Anwar for the period from 4 February to 31 March 1993. I now deal with the period from January to 3 February 1993. Under the law when the defence of alibi is raised, it is for the defence to adduce evidence to establish the alibi. Section 103 of the Evidence Act 1950, illustration (b) provides:

> B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

When such evidence is adduced by the defence for the purpose of establishing the alibi the court has to consider whether the evidence has raised a reasonable doubt on the prosecution case and not whether such evidence had created a reasonable doubt as to the innocence of the accused (see *Yau Heng Fang v. Public Prosecutor* [1985] 2 CLJ 22).

The question is whether Sukma has adduced evidence to show his alibi. As what I had found earlier in this judgment, Dato' Seri Anwar has successfully accounted for his whereabouts from 4 February to 31 March 1993 excluding 19 February 1993. This part of the alibi would equally apply to Sukma under the circumstances of this case as it is the case of the prosecution that Sukma brought Dato' Seri Anwar to his apartment on the day in question when the alleged incident of sodomy on Azizan took place.

However, on close examination of the evidence adduced, I failed to find any evidence adduced by Sukma or any witness called by him to show his whereabouts for the period covering January to 31 March 1993. It is therefore my judgment that Sukma has not adduced any evidence to support his alibi for the said period by himself or through Dato' Seri Anwar. His defence of alibi therefore fails.

*(b) Renovation*

Sukma said in evidence that the charges against him could not be sustained for the reason that he was not in occupation of the apartment – he moved into it in April 1993 as shown in his letter to Bandar Raya Developments Bhd. (exh. D36). The apartment was under major renovation according to Sukma and supported by the evidence of Rahimazlan (SD4) and Tan Seng Khoon (SD9).

The renovation works was supervised by Rahimazlan (SD4). He said that the renovation works involved the breaking down of the wall between the master bedroom and another adjoining room and putting up a new wall in its place and fixing of wall and floor tiles in the bathroom of the master bedroom (wet trade) and carpentry works and laying carpets, fixing of air-condition units and fixing wall papers (dry trade). He was not very sure how long exactly it took for the renovation works to be completed but he said it took about four months. He also said the fixing of the wall paper for the whole apartment took four to five days from his experience. He does not know how long it took to complete the renovation of the master bathroom. He also said that the carpentry works involving the fixing of built-in cabinet in the kitchen, master bedroom in the dining hall took between four to six weeks. He further testified that renovation works

carried out are shown in the plans (exhs. IDD37A, B & C). It is to be noted that these plans were produced for identification purposes only. They have not been properly tendered through the maker as they should have been and are not exhibits in the strict sense and cannot therefore form part of the record in this case (see *Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors.* [1977] 1 MLJ 180. I shall therefore disregard references to them. In any event IDD37A states the Furniture Layout Plan for Condominium Renovation at Tivoli Villas belonging to Mr. Suda Te Kanawa. It does not show it is in respect of Sukma's apartment although it was for the use of Megareka Sdn. Bhd. No evidence was adduced why the plan was used to show renovation works in respect of Sukma's apartment.

Be that as it may, I find from the evidence of SD4 and SD9 the technical supervisor of Bandar Raya Developments Bhd. at the material time it was established there was a major renovation of the bathroom to the master bedroom only. In his evidence, he said in the month of January 1993 he inspected Unit No. 10-7-2, Tivoli Villa and noticed that a major renovation work was carried out confined to the bathroom attached to the master bedroom. At the time he visited the apartment, he did not notice any other renovation works especially in the master bedroom and the second bedroom. He further said that he inspected the apartment probably one week before a letter dated 5 January 1993 (D32) was written. D32 was written by Chee Too Nam @ Chin Too Nam (SD8), the Senior Project Manager of Bandar Raya Developments Bhd. based on what SD9 told him. SD9 confirmed the contents of D32 which stated, *inter alia*, that there was a major renovation to the master bathroom which involved the extension of the bathroom by approximately 2'0" into the master bedroom, removal of all the wall and floor tiles and sanitary wares including the reinforced concrete vanity top and false ceilings. On the evidence of SD4 and SD9, I am satisfied that there was renovation works being carried out to the master bathroom. This would mean that the other rooms are not in any way affected by the renovation works of the master bathroom and the knocking down of the wall.

In his evidence Sukma said that he moved into the apartment in April 1993. From the notes of evidence this is what transpired:

Question : Bilakah kamu pindah masuk ke apartment itu?

Answer : Dalam bulan April 1993.

It was submitted by the prosecution that this evidence only shows that Sukma did not occupy the apartment before April 1993. The fact remains that he has access to the apartment from December 1992. There is no evidence to show that the keys to the apartment were not in his possession at the time when the renovation works were in progress. I agree with the submission by the prosecution that Sukma had unrestricted and free access to the apartment. I therefore conclude that Azizan's evidence that he was sodomised in the apartment is unshaken and reliable.

*(c) Bed And Mattress*

It was submitted by the defence that it was not possible for Sukma to commit sodomy as alleged in the apartment as there was no bed or mattress in the apartment until 11 February 1993. It is in the evidence of Rahimazlan that there was no bed or mattress in the apartment until 11 February 1993. The divans and mattresses according to the cash receipt (exh. D35) were supplied on 11 February 1993. He further said that he received the items mentioned in D35 but admitted that he did not acknowledge receipt of the goods.

I find upon close scrutiny that D35 appeared to me to be a new and freshly executed receipt with no visible signs of being an old receipt issued in 1993. Further it was not signed by the person who issued it. The authenticity of D35 is suspect. In any event, it shows clearly that what was supplied was three Divans and two VIP mattresses. This evidence is contrary to the reliable and credible evidence of Azizan who said that there was a bed (not a divan) and a queen size mattress in the room where he was sodomised.

Rahimazlan is an interested witness as can be gathered from his evidence in cross-examination which runs as follows:

Question : Tidak keterlaluan jika saya katakan hubungan persahabatan awak dengan Sukma sangat rapat setelah mengenali dia sejak 1979?

Answer : Saya setuju hubungan persahabatan kami adalah akrab.

Question : Bolehkah dikatakan sebagai adik beradik?

Answer : Saya setuju.

Question : Adakah awak bersimpati dengan Sukma atas nasib yang dihadapinya sekarang?

Answer : Saya bersimpati dengannya.

Question : Saya juga katakan awak merasa sebagai sebahagian daripada tanggungjawab anda sebagai sahabat Sukma awak perlu memberi sokongan moral kepadanya?

Answer : Saya setuju.

It is clear from the above evidence that SD4 came to court to assist to give moral support to Sukma to help Sukma in his predicament. I therefore treat his evidence in the circumstances with suspicion and caution.

The next witness called by Sukma was Tan Seng Khoon (SD9). He was at the material time the technical supervisor of Bandar Raya Developments Bhd. who inspected Sukma's apartment in January 1993. In his evidence, he said, *inter alia*, that he saw no carpet or bed in the apartment. When he said this I am of the view that he was referring only to the master bedroom because he only noticed the renovation works in the master bathroom. There is no evidence that he inspected the other parts of the apartment. I am of the view therefore his evidence when he said there was no bed in the apartment cannot be accepted as conclusive that there was no bed or mattresses in the other rooms. I therefore do not accept his evidence that there was no bed or mattresses in the apartment at all before the delivery of the divans and mattresses in D35.

In conclusion, I wish to state I prefer the evidence of Azizan whom I found to be a reliable and truthful witness. His evidence showed in fact that there was a bed and a queen size mattress in the room where he was sodomised.

*(d) Credibility Of Azizan*

The learned counsel for Sukma referred again to the issue on the credibility of Azizan. It was submitted that Azizan has contradicted himself when he said at one point he was not sodomised and at another point he said he was sodomised. Azizan has not explained this contradiction. The defence complained that Sukma was denied the right to call the Prime Minister to testify on his behalf and this denial was a gross injustice to Sukma because this deprived Sukma of adducing evidence to establish that Azizan had told the Prime Minister he was not sodomised. According to the defence counsel the evidence to be adduced is relevant to assess the credibility of Azizan and to create a doubt in the prosecution case. I had earlier referred to the ruling on the necessity of the Prime Minister to give evidence which was that the Prime Minister would not be able to give relevant evidence. I find that no injustice has been caused to Sukma by the order made by this court that the Prime Minister need not be called as a witness.

It was also raised by the learned counsel for Sukma that the dismissal of an application to recall Azizan under s. 425 of the Penal Code has also deprived Sukma of adducing evidence to attach Azizan's credibility. To put the record straight, the application to recall Azizan for the purpose of adducing evidence specifically on his trial at the Mahkamah Syariah, Alor Gajah, Melaka and not for the purpose of clarifying other points in his evidence. The reasons for disallowing the application to recall Azizan has been dealt with earlier.

In conclusion I must say that the submission of the defence counsels for both accused on the issue of credibility of Azizan except for the issue that Dr. Mahathir was not in court to testify as a witness on behalf of the defence and the refusal of the court to allow Azizan to be recalled, is a repetition of what was submitted by them earlier at the end of the prosecution case. I had dealt with this issue in depth at that stage and my finding that Azizan is a truthful and creditable witness still stands as solid as the Rock of Gibraltar.

*(e) Reviewing The Admissibility Of Sukma's Confession (P4)*

In their submission, the defence counsels for both accused urged this court to review the ruling on the admissibility of the confession of Sukma. It is to be remembered that the caution statement was made voluntarily and admitted as exh. P4 after a trial-within-a-trial was held which lasted for about eighteen days.

The request for the review of the ruling can be entertained if further evidence emerges which is relevant to the voluntary character of the statement or confession.

In *R v. Watson* [1980] 2 All ER 293, it was held that because a judge retains control over the evidence to be submitted to the jury throughout a trial, he is not precluded, by the fact that he has already ruled at a trial within a trial in the jury's absence that a written statement by the accused is admissible in evidence as being voluntary, from reconsidering that ruling at a later stage of the trial if further evidence emerges which is relevant to the voluntary character of the statement, and from ruling in the light of that evidence that the statement is not admissible. However, the occasions on which a judge should allow counsel to submit that a previous ruling on the admissibility of evidence should be reconsidered are likely to be rare, and judges should continue to discourage counsel from making such submissions where they are founded on tenuous evidence (see also *Public Prosecutor v. Mustaffa bin Ahmad* [1986] 1 MLJ 302).

The ground relied on for the request to review the ruling on the admissibility of the confession was the evidence of a letter (D28) written by Sukma to Dato' Seri Anwar. According to Sukma this letter was written by him in his cell in Bukit Aman Lock-up where he was detained after his conviction by the Sessions Court for another offence. It is to be noted the fact that D28 was written was not in issue. The question that has to be determined in respect of D28 is whether it is fresh evidence which would be a ground for reviewing the confession. D28 contains, *inter alia*, details pertaining to Sukma's arrests, the ill treatment and the inhuman treatment he had received before his confession was recorded, the allegations that he was programmed by the police to implicate Dato' Seri Anwar in the sodomy incident, that he created stories to please the police. A close perusal of D28 does not reveal any fresh evidence to justify the review of the ruling on the admissibility of Sukma's confession. All that was stated therein had been narrated by Sukma in his evidence given at the trial-within-a-trial. It is strange that D28 was not produced at the trial within the trial and not even referred to at that time. I am more inclined to the view that D28 did not exist at the time when he gave evidence during the trial-within-a-trial. D28 was written for the purpose of tendering it at the defence stage as fresh evidence so that it can form the basis for the application to review the admissibility of Sukma's confession. It is an afterthought and the contents do not amount to fresh evidence on which this court can review its earlier ruling on the admissibility of Sukma's confession. The request for review of Sukma's confession was therefore rejected.

*(f) Corroboration*

The issue of corroboration was raised again. In his submission Encik Gobind Singh Deo submitted that Azizan's evidence is unusually convincing and the need for corroboration does not arise. This submission is also substantially a mere repetition of the earlier submission on this issue at the end of the prosecution case. The only new point highlighted in the submission this time is in connection with D28, the letter written by Sukma to Dato' Seri Anwar in relation to his confession. I had considered this part of the evidence earlier where I had ruled that D28 does not justify this court to review the ruling on the admissibility of the confession and the admissibility of the confession stands. The question whether the confession can be used as corroborative evidence does not arise again in view of my ruling on the review of the admissibility of the confession. I therefore conclude that this submission has no merit.

Before I embark on a consideration whether the defence has created a reasonable doubt on the prosecution case, I consider it necessary to state briefly the principles of law with regard to the burden of proof. The burden of proof lies throughout the trial on the prosecution to prove its case beyond a reasonable doubt against the accused. When the defence is called all that the accused has to do is to cast a reasonable doubt on the prosecution case.

How the law is to be applied is found in the celebrated case of *Mat v. Public Prosecutor* [1963] 29 MLJ 263 where it was held if the court accepts the explanation given by or on behalf of the accused, it must acquit. But this does not entitle the court to convict if it does not believe that explanation, for he is still entitled to an acquittal if the explanation raises a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence the court is left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon him.

The principle enunciated in *Mat*'s case was adopted by the Supreme Court in *Mohamad Radhi bin Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073 where Azmi SCJ in delivering judgment of court said at p. 2076:

> We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v. PP* go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. (see also *Ishak Shaari v. Public Prosecutor* [1997] 3 CLJ Supp 223).

Further it was held:

> It is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case.

What constitutes reasonable doubt has been discussed and defined in many cases. In *Liew Kaling & Ors. v. Public Prosecutor* [1960] 26 MLJ at p. 306, Thomson CJ said that it may be that "reasonable doubt" is a little difficult to define. His Lordship then quoted from the judgment of Denning J (as he then was) in the case of *Miller v. Minister of Pensions* [1947] 2 All ER 372, a passage, dealing with the degree of proof in a criminal case which reads as follows:

That the degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice (see also *Public Prosecutor v. Saimin & Ors* [1971] 2 MLJ 16.

This brings me to the question whether the defence has raised a reasonable doubt on the prosecution case. I have carefully considered the evidence adduced by the prosecution and the defence as a whole. My conclusions are as follows:

(1) it is my finding as a fact that the alibi of both the accused does not cover the whole of the period between January to March 1993 as stated in the charge. The alibi covered the period only from 4 February to 31 March 1993 and is therefore incomplete. The defence of alibi therefore fails.

(2) the defence that both the accused never went to Tivoli Villa at 7.45pm between January to March 1993 also failed based on the evidence of Azizan which I accepted as truthful and reliable.

(3) the defence of conspiracy to fabricate evidence has not been substantiated by admissible and cogent evidence adduced by the defence. This defence also failed.

(4) the voluntariness of Sukma's confession (P4) is affirmed.

(5) the truth of P4 has been established as far as it relates to both the accused.

(6) there was corroboration on the evidence of Azizan.

(7) the credibility of Azizan is affirmed.

(8) Sukma has not cast any doubt on the prosecution case of abetment against him. There is ample evidence adduced that he abetted Dato' Seri Anwar in committing sodomy against Azizan.

(9) it is my finding that the defence evidence adduced on behalf of both the accused as a whole has not succeeded in creating any reasonable doubt on the case for the prosecution.

(10) it is also my finding that the prosecution has proved its case beyond a reasonable doubt on the charges against both the accused.

I accordingly found both Dato' Seri Anwar and Sukma guilty on the charges against them. I accordingly convicted Dato' Seri Anwar on the charge against him. I also accordingly convicted Sukma on the two charges against him.

**Mitigation**

Before imposing the sentence on both the accused, I asked the defence counsels to address the court on sentence. Encik Fernando, the leading counsel for Dato' Seri Anwar requested for a short adjournment. When hearing resumed after a short adjournment he informed the court that Dato' Seri Anwar elected to address the court himself. I allowed him to do so. Dato' Seri Anwar in fact made a speech reading from a prepared text (see document marked ("A"). A close examination of the text shows that he was making a political speech. He took the opportunity given to him to mitigate as a platform to highlight his grievances and dissatisfaction with Dato' Seri Dr. Mahathir. He attacked the integrity of Dato' Seri Dr. Mahathir. He continued reading and came up with an attack on the judicial system. He criticised my decision and said it is unjust, disgraceful and revolting and it disgraces the judiciary and this nation of ours.

I reminded him to confine himself to relevant matters which the court can take into consideration before imposing an appropriate sentence under the circumstances of the case. He carried on reading the text.

I find that his speech does not qualify as one which can be called as a plea of mitigating. The only relevant part in the text which is useful is a small portion where he said at the end that during his 17 years of service with the government, he was loyal to the government and the Prime Minister. His loyalty was based on principles.

At the end of the speech by Dato' Seri Anwar, I allowed Encik Karpal Singh, one of the counsels for Dato' Seri Anwar to address the court on the law on the question of sentence. He referred to s. 292 of the Criminal Procedure Code which states, *inter alia*, that when a person who is undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced, as the court awarding the sentence may direct. The learned counsel urged the court to impose the sentence on the accused to run from the date of conviction and not at the expiration of the imprisonment term of six years for which he is now serving with effect from 14 April 1999. He rightly conceded that the court has a discretion whether to order the sentence to be imposed to run concurrently or consecutively. He referred to the case of *Public Prosecutor v. Ooi Wang San* [1998] 3 CLJ 270 where it was held by the Court of Appeal:

Section 292 of the Criminal Procedure Code gives a discretion to the court, depending on the facts and circumstances of each particular case, whether to order the commencement of the sentence on such convicted persons, either immediately or at the expiration of the imprisonment to which he has been previously sentenced.

Encik Fernando, the leading counsel for Dato' Seri Anwar also addressed the court and urged the court to impose a sentence to commence from the date of arrest of the accused ie, from 20 September 1998. He pointed out that there are no exceptional circumstances for this court to exercise its discretion to order sentence to run from date of conviction. On this submission reference may be made to s. 282(d) of the Criminal Procedure Code which is relevant and it provides that every sentence of imprisonment shall take effect from the date on which the same was passed unless the court passing such sentence otherwise direct.

It can thus be gathered the court still has a discretion in this matter.

On behalf of Sukma, Encik Gobind Singh Deo submitted that Sukma was born on 25 June 1961, unmarried, unemployed and is suffering from asthma and bronchities. No medical evidence to support that he is suffering from asthma and bronchities. He urged the court not to impose whipping due to his health condition.

It was also submitted that Sukma has been put to severe trauma following the long trial which has attracted wide publicity both nationally and internationally. He has to live with a social stigma considering the nature of the offence for which he has been tried and convicted. Urge the court to impose the sentence to run concurrently.

The learned Attorney-General for the prosecution pointed out that the offences committed by both the accused are very serious offences of which they are liable to 20 years imprisonment and whipping. Under s. 288 of the Criminal Procedure Code, the court can impose a sentence of whipping not exceeding 24 strokes. He urged the court to impose a deterent sentence to reflect the seriousness of the offence committed by both the accused.

It is axiomatic that there are general principles in fixing sentence. In doing so the court has to consider the nature and gravity and seriousness of the offence, the antecedents of the accused, the deterrent effect of the punishment and above all the public interest (see *Lim Guan Eng v. Pendakwa Raya* [1998] 3 CLJ 769).

The court may also take into consideration whether the accused is genuinely contrite and regrets what he has done.

In the instant case, Dato' Seri Anwar did not show any remorse at all. On the other hand, he displayed an attitude of arrogance and disrespect to the bench and levelling against his former cabinet colleagues and political allies allegations of corruption and malpractices which are not relevant to the issues before the court. His purpose of making all these allegations against those people when he testified and repeating these allegations emphatically in his so called mitigating address is to tarnish the image of all those people in the eyes of the public at a wrong forum when those people have no opportunity to defend themselves.

Another factor which I took into consideration is the seriousness of the offence for which the accused is convicted. The seriousness of the offence is reflected by parliament in its wisdom by enacting a law in the form of s. 377B of the Penal Code which provides for a sentence of 20 years imprisonment and whipping on conviction.

I have tried my very best to look for mitigating circumstances in favour of Dato' Seri Anwar, and with all humility, I find one that deserves recognition and consideration. This is the fact that he has served the country as a politician for 17 years. The factors that are against him are that he has committed a serious crime and one which is despicable and unacceptable to our society. He was a very high ranking officer being the number two in the hierarchy of the country's administration and he has not shown a high moral standard by committing sodomy, an offence which demands outright condemnation. It pains me to impose a custodial sentence on a former Deputy Prime Minister of the country but I have no choice. I would be failing in my duty if I do not impose a sentence commensurable with the offence. It is indeed pitiful and sad that Dato' Seri Anwar indulged himself in such an act which is an act of self destruction which led to his downfall.

Another factor to be taken into account is that Dato' Seri Anwar is above 50 years of age and no whipping is to be imposed on him under s. 289(c) of the Criminal Procedure Code. I also considered he has one previous conviction. I am also inclined to order the sentence of imprisonment which I propose to impose to run consecutively after the expiry of the sentence of six years which Dato' Seri Anwar is now serving on the ground that the offence on which he is now convicted is a distinct offence from the previous offence for which he is now serving imprisonment sentence. The order that the present sentence to run concurrently to the sentence he is now serving would not reflect the seriousness of the offence.

In the circumstances and after taking into consideration of all the mitigating factors available I am of the firm view that the appropriate sentence on Dato' Seri Anwar is nine (9) years imprisonment to run consecutively from the present sentence he is now serving.

As for Sukma, I take into consideration he is liable to whipping and this is a factor which merits a lesser sentence of imprisonment. There are no compelling circumstances which would justify a light sentence on him. The state of his health does not warrant that whipping should not be imposed on him. The state of his health will be a matter for the Medical Officer to decide at the time of the inflicting of the punishment of whipping as provided for under s. 290 of the Criminal Procedure Code.

In the circumstances and after taking into consideration of the mitigating factors, I sentenced Sukma to six (6) years imprisonment with effect from date of conviction and 2 strokes on the first charge and six (6) years on the second charge and 2 strokes. The sentence of imprisonment to run concurrently.

The defence counsel on behalf of Sukma applied for a stay of execution. Despite an objection by the prosecution, I exercised my discretion to grant a stay taking into consideration that there is no likelihood of him absconding, since he has been attending the trial when he was on bail. I am also of the view that the accused should be given all the latitude to defend himself until his right of appeal is exhausted. I accordingly ordered the stay of execution and Sukma is released on a bail of RM50,000 with two sureties pending his appeal. I also ordered that his International Passport be retained in the custody of the court with liberty to apply.

**Ruling On Whether Dato' Seri Dr Mahathir Mohamad Is To Attend Court To Give Evidence**

Dato Seri Dr Mahathir bin Mohamad, the Prime Minister (Dr Mahathir) is required to give evidence for the defence at this trial.

A subpoena has accordingly been issued and served on Dr Mahathir at the request of the counsel for Sukma Darmawan Sasmitaat Madja (the 2nd accused). The learned counsel for Dato' Seri Anwar Ibrahim (the 1st accused) has also applied for a subpoena which is yet to be issued. For the purpose of this ruling as agreed by the learned counsel for the 1st accused the subpoena is deemed to have been served on Dr Mahathir.

The learned Senior Deputy Public Prosecutor, Datuk Gani Patail (the DPP) raised an objection to the calling of Dr Mahathir to appear in court as a witness and invited the court to make a ruling under s. 136(1) of the Evidence Act 1950 (the Act) which reads:

> When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved; would be relevant, and not otherwise.

Encik Karpal Singh on behalf of the 1st accused raised a preliminary objection and submitted that the DPP has no *locus standi* to raise the objection. The procedure is that the person who has been served with the subpoena, that is in this case Dr Mahathir, has to make an application to set aside the subpoena.

It is to be noted that there is no specific provision in the Criminal Procedure Code dealing with the procedure to set aside a subpoena which has been served on a person to attend court to give evidence. In practice the person who has been served with a subpoena either in a civil or criminal proceeding may apply to court to set it aside. (See *Wong Sin Chong & Anor v. Bhagwan Singh & Anor* [1993] 4 CLJ 345, *The King v. Baines* [1909] 1 KB 258 and *Ismail v. Hasnul & Abdul Ghafar v. Hasnul* [1968] 1 MLJ 108.)

It was contended by the defence that since Dr Mahathir has not made an application to set aside the subpoena, the DPP has no *locus standi* to raise the objection in this case. With respect I do not agree with this contention. In my understanding it is clear that s. 136 does not require any application to be made before it is invoked. I am of the view this section becomes operative when the court is allerted by any party in the proceeding. In the instant case the Public Prosecutor is a party in the proceedings and the DPP who appears on behalf of the Public Prosecutor has every right to raise the objection on the authority of *Wong Chang*'s case *(supra)*. In that case the

application to set aside the subpoena was not made by the person who had been served with it. It was made by the plaintiff. Similarly in this instant case the DPP being a party in the proceedings has the right to raise the objection and therefore has the *locus standi* even though no application has been filed by Dr Mahathir.

Encik Karpal further contended that s. 136(1) is under Chapter 10 of the Act which concerns the Examination of Witness. It is therefore premature to invoke this section at this stage. It should be invoked when an objection as to relevancy of evidence is raised when the witness takes the stand in the witness box and only then the judge would have to consider the objection and make a ruling on the admissibility of the evidence. Is this the correct approach in interpreting this section? To me a proper reading of the section does not warrant the approach as advocated. It is clear to me the court has the power under this section to ask the party who proposes to give evidence of any fact in what manner the alleged fact, if proved, would be relevant. The preliminary question that has to be considered is whether the power can be exercised by the court before a proposed witness begins to give evidence. The word 'proposes' used in the section clearly contemplates that the court can exercise the power before a proposed witness gives evidence.

I totally agree with the reasons given and the conclusion arrived at by Datuk Augustine Paul J in respect of the exercise of the power vested in the court under s. 136(1) in *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 CLJ 215 at p. 398 where he said:

> A matter of critical importance is whether this power can be exercised by the court before a proposed witness begins to give evidence. In my opinion, the language employed in the sub-section clearly contemplates the exercise of the power at that stage as it empowers the court to inquire from a party '... in what manner the alleged fact, if proved would be relevant ...' when a party '... proposes to give evidence of any fact ...' and to admit the evidence only if it finds it to be relevant. The word 'proposes' means the court can exercise the power given by the sub-section when a party wishes to call a witness, that is to say, before a proposed witness begins to give evidence.

On this premise I am of the view that the power of the court to consider the relevancy of the evidence can be exercised before the witness begins to give evidence.

The learned counsel for the second accused adopted the submission of Encik Karpal Singh and urged the court to rule in favour of the preliminary objection.

After carefully considering the submissions of counsels and for reasons which I had stated above I rule the preliminary objection by the defence is devoid of merit and is dismissed.

Having made the ruling I now proceed to ascertain the relevancy of the evidence which the defence proposes to give by calling Dr Mahathir as a witness.

Section 136 of the Evidence Act 1950 gives the discretion to the court to ask the party proposing to give evidence of any fact in what manner the alleged fact, if proved would be relevant, and the court shall admit the evidence if it thinks that the fact, if proved would be relevant, and not otherwise. It is the contention of the defence that Dr. Mahathir can give material and relevant evidence to establish one of the defences of both the accused namely a conspiracy to fabricate evidence of sodomy as alleged in the charges. The question which the court has to enquire is whether the evidence to be adduced by Dr Mahathir is relevant.

Both the accused filed affidavits to show the relevancy of the proposed evidence to be adduced. The learned Deputy Prosecutor Datuk Gani Patail took exception to the procedure adopted by the defence and contended that the proper procedure is for the defence counsel to give the substance of the proposed evidence to the court and not by way of affidavits. The reason advanced to support this contention is that the affidavits will form part of the record and contain a lot of allegations which is scandalous in nature. In support of this contention Datuk Gani Patail referred to *PP v. Lam Peng Hoa* [1996] 3 CLJ 747. With due respect this case is not applicable as in that case the affidavit was used to supplement the oral evidence which has already been given by the chemist. The case of *PP v. Anwar bin Ibrahim* [1999] 2 CLJ 215 is also referred to support the contention that the proper procedure is for the counsel to explain to the court the substance of the evidence. I am of the view, with greatest respect, that there is no procedure laid down in the Criminal Procedure Code to be followed in establishing the relevancy of the proposed evidence for the purpose of s. 136 of the Evidence Act 1950. I am therefore of the opinion that the counsel for the party proposing to give the evidence may either address the court from the Bar as what was done in *PP v. Dato' Seri Anwar* or resort to affidavits as in the instant case.

Before embarking on the determination of the question of the relevancy of the proposed evidence, I wish to state that the proposition of law that a conviction is bad if the accused is not given the opportunity to examine their witnesses (see *Ronald Wood Matham and Others v. State of West Bengal* AIR [1954] SC 455) and a conviction arrived at without affording an opportunity to the defence to produce relevant evidence cannot be sustained (see *Habeeb Mohamad v. State of Hyderbad* – AIR [1954] SC 51) is in the forefront of mind.

I shall now proceed to consider whether the proposed evidence to be adduced from Dr Mahathir of facts that are relevant. Encik Karpal Singh on behalf of the 1st accused raised a number of points to support the contention that Dr Mahathir is a material witness. Encik Karpal started by saying that affidavit in reply of the Prime Minister clearly shows that he is a material witness who ought to be called by the prosecution. He even went further to suggest that even if prosecution thought it fit not to call Dr Mahathir for reasons best known to the prosecution then it is the duty of the court to call him as court witness under s. 425 of the Criminal Procedure Code. I see no merit in this argument as the question of invoking s. 425 does not arise as Dr Mahathir has been served with a subpoena to appear in court by the defence. The issue at hand is whether the proposed evidence to be adduced is material to prove a fact which is relevant. It is to be noted that Dr Mahathir as a Prime Minister ought to make no difference and should not be considered as a factor in determining whether he should attend court to give evidence. In the case of *Ismail v. Hasnul & Abdul Gafar v. Hasnul* [1968] 1 MLJ 108, Raja Azlan Shah J (as His Majesty then was) said on this issue at p. 110.

> The practice in all courts has been that a subpoena may be issued against anybody, be he a Minister of the Government or a nonentity. It cannot be gainsaid that a Minister has any more privilege than that enjoyed by a member of the public. Injustice will arise if equals are treated unequally. But the court possesses inherent jurisdiction to see that the privilege is properly exercised and in a proper case can restrain the abuse. (See also *R v. Baines* 25 TLR 79).

In deciding the issue at hand I treat Dr Mahathir just like any citizen of this country without any privilege as far as the attendence in court as a witness is concerned.

Having said that I shall now proceed to consider the other points raised by Encik Karpal which I think are relevant. The next point raised is with regard to the evidence that Azizan met the Prime Minister. Encik Karpal referred to para. 4 of Dr Mahathir's affidavit in reply the relevant part of which states:

> Azizan Abu Bakar menceritakan bagaimana kali pertama ia diliwat apabila Dato' Seri Anwar datang ke biliknya dan menyuruh ia mengurut badannya.

It is submitted that this must be taken in the light of the withdrawal of the allegations by Azizan and it is relevant to show that Azizan is capable of giving different versions.

It cannot be denied that Dr Mahathir refers to what Azizan told him how he was sodomised the first time by the 1st accused. This is evidence given on oath by a witness intended to be called by the defence and what he said is

crystal clear and needs no further clarification. In any event this revelation is highly prejudicial to the accused and would not be admissible being hearsay, at any cost. It is also contended that this is relevant to test the credibility of Azizan Abu Bakar. Azizan has given evidence on the sodomy allegations and his credibility can be assessed on that evidence and on the evidence given by the other witnesses. For this reason it will serve no useful purpose to call Dr Mahathir to testify on this issue.

Another issue raised by Encik Karpal is the evidence given by the 1st accused himself in connection with the letter dated 5 Ogos 1997 written by Umi Hafilda to the Prime Minister who asked the 1st accused to ignore the allegations therein and to read and destroy; and evidence that "Cawangan Khas telah membuat laporan kepada Perdana Menteri sebagai Menteri Dalam Negeri bahawa tuduhan-tuduhan itu tidak ada asas." It is submitted by En. Karpal that it is relevant to call the Prime Minister and to find out from him why at that time he agreed with the conclusion that the allegations against the 1st accused is without basis. Dr Mahathir has provided with the answer to this question in his affidavit where he says in para. 8:

> (i) Saya tidak percaya kepada isi kandungan surat yang ditandatangani oleh Umi Hafilda bertarikh 5 Ogos 1997 kerana pada masa itu saya masih percaya Dato' Seri Anwar adalah orang yang warak dan tidak mungkin melakukan perbuatan yang amat jijik dan kotor seperti yang dinyatakan dalam surat tersebut. Oleh sebab itulah apabila saya menyerahkan surat itu kepada Dato' Seri Anwar saya menasihatkan supaya Dato' Seri Anwar 'ignore such irresponsible and malice allegations' dan 'read and destroy'.
>
> (ii) Pada masa saya menerima surat/laporan daripada Dato' Said Awang, Pengarah Cawangan Khas dan surat-surat daripada Umi dan Azizan bertarikh 18 Ogos 1997 saya tidak tahu yang Dato' Seri Anwar telah menyuruh Dato' Said Awang supaya menggempar dan memaksa Umi dan Azizan menarik balik surat asal mereka. Jika saya tahu saya tidak akan percaya atau sekurang-kurangnya meragui laporan Dato' Said Awang dan penarikan balik tuduhan oleh Umi dan Azizan.

As the answers are clear and unequivocal it is not necessary for Dr Mahathir to appear in court to give evidence on the issue.

In addition to the issues which had been raised and which I have considered above the 1st accused also deposed in his affidavit in paras. 9, 11, 12 and 15 that Dr Mahathir made public statements in the local press that allegations made against the 1st accused are without basis, malicious and baseless. These statements are not denied by Dr Mahathir and he explains in para. 5 of his affidavit in reply that:

> Kenyataan-kenyataan itu dibuat sebelum saya mendapat bukti yang jelas akan salah laku seks luar tabii Dato' Seri Anwar Ibrahim. Sesungguhnya saya membuat kenyataan itu semata-mata kerana saya mempunyai penuh kepercayaan kepada Dato' Seri Anwar yang saya percaya adalah seorang yang warak dan berpegang teguh kepada ajaran Islam. Tuduhan yang dibuat terhadap Dato' Seri Anwar di waktu itu amat bertentangan dengan imej yang telah dipertunjukkan olehnya semasa saya mengenalinya. Tetapi hasil penyiasatan polis dan pengakuan yang dibuat oleh mereka yang terlibat kemudiannya meyakinkan saya bahawa tuduhan-tuduhan salahlaku seks yang dibuat terhadap Dato' Seri Anwar adalah benar dan saya tersilap besar berkenaan dengan Dato' Seri Anwar dan telah membuat kenyataan media itu semata-mata berdasarkan kepada persepsi saya terhadapnya pada masa itu.

I accept this explanation as there is evidence before this court that there were two investigations in this case, one pursuant to the police report made by ASP Zull Aznam, on the "surat layang" and the second subsequent report by Azmin Ali in connection with the book "50 Dalil Kenapa Anwar Ibrahim tidak boleh menjadi PM". Dr Mahathir is entitled to form his own opinion based on the police investigation pursuant to the reports made. This opinion is irrelevant as the court has to decide the ingredients in the charges on evidence and not on the opinion of a witness, unless of course the witness gives evidence as an expert. Under these circumstances it is a futile exercise to call Dr Mahathir to give evidence on this issue which is not relevant.

The rest of the other allegations made by the 1st accused as contained in his affidavits are not relevant as they relate to political and economic discussions between the 1st accused as a Deputy Prime Minister then and the Prime Minister. There are also allegations of political conspiracy involving political figures but not Dr Mahathir. There is not an iota of evidence or even a suggestion by any witnesses this far to show that Dr. Mahathir is involved in any political conspiracy let alone evidence to fabricate evidence against the 1st accused. In any event conspiracy to topple Dato' Seri Anwar, which is not relevant in this trial even assuming that there exists such a political conspiracy. In para. 10 of his affidavit the 1st accused says:

> I verily believe that Dr Mahathir has a lot of other information and evidence to prove that I am innocent of the charges preferred against me. Therefore it is important for my defence that Dr Mahathir be brought to court forthwith without any further delay to give evidence.

This is a bare assertion which does not disclose the details of the information and evidence and in what way they are relevant. The details are the very things that should be mentioned in the affidavit for the purpose of s. 136 of the Evidence Act 1950.

Another point that need to be mentioned is the allegations by the 1st accused that Dr Mahathir was suspicious that he may be challenged by him (Dato' Seri Anwar) for the UMNO Presidency in 1999. It is further deposed that Dr Mahathir is to explain why there was drastic change in attitude towads the 1st accused. This is irrelevant. In any event this allegation is answered in para. 15 of Dr Mahathir's affidavit which reads as follows:

> Merujuk kepada perenggan 20 Afidavit Anwar, saya mengatakan bahawa walaupun ramai juga yang memberitahu saya bahawa Dato' Seri Anwar akan mencabar saya sebagai Presiden UMNO pada tahun 1999, saya tidak gentar dan menggelisah. Sesungguhnya jika Dato' Seri Anwar mencabar saya, saya yakin UMNO akan menolaknya. Oleh itu tidak ada sebab kenapa saya harus takut akan kemungkinan saya dicabar oleh Dato' Seri Anwar dan dengan itu menukar sikap saya kepadanya. Yang menyebabkan penukaran sikap saya kepada Dato' Seri Anwar ialah bukan kerana saya marah kepadanya, tetapi berasaskan kepada hasil penyiasatan polis yang disampaikan kepada saya berkaitan dengan buku "50 Dalil" dan pengakuan Azizan Abu Bakar kepada saya, saya puashati bahawa Dato' Seri Anwar telah melakukan salahlaku seks luar tabii dengannya.
>
> Saya menafikan dakwaan saya terlibat dengan konspirasi untuk menjatuhkan Dato' Seri Anwar. Sesungguhnya saya tidak boleh membenarkan orang yang tidak bermoral seperti itu menjadi Timbalan Perdana Menteri dan bakal pengganti saya sebagai Perdana Menteri. Juga ia tidak layak menjadi Timbalan Presiden UMNO bahkan ahli UMNO.

The answer is explicit and need no further clarification. To call Dr Mahathir to give evidence on this fact is to my mind tantamount to having a confrontation with your own witness which may lead to indecent questions or questions intended to insult or annoy be asked. In any event the question of the removal of the 1st accused as Deputy Prime Minister and Deputy President of UMNO are issues which are not relevant in this trial.

A further point to be noted is that Dr Mahathir states in para. 26 of his affidavit as follows:

> Saya dengan sesungguhnya menyatakan saya tidak pernah pada bila-bila masa memberi arahan kepada atau bersubahat dengan sesiapa untuk mereka apa-apa keterangan untuk menuduh Dato' Seri Anwar melakukan perbuatan liwat terhadap sesiapa pun.

This assertion hits the nail in the coffin and if your own witness says this it is obvious to me to call him to testify is definitely an abuse of the process of the court and the court has a duty to restrain this abuse. (See *Ismail v. Hasnul (supra)*).

Now I will consider whether Dr Mahathir ought to appear in court to testify for the 2nd accused. Sukma in his evidence and in his affidavit, which is brief has not in any way implicate Dr Mahathir. There is equally no evidence to show that Dr Mahathir knows or is acquainted with the 2nd accused at all. The 2nd accused has not satisfied me that there is evidence to show that Dr Mahathir can give any evidence to prove any facts which are relevant to his defence.

On the available evidence this far produced at this trial and on a careful consideration of submissions of counsels for all parties I find there is no evidence to show or even suggest that Dr Mahathir was involved in any manner with a conspiracy to fabricate evidence of sodomy against both the accused as alleged by them. I am satisfied that Dr Mahathir if called to testify will not be able to give relevant evidence to assist both the accused. Therefore I come to the inevitable conclusion that the defence has failed to satisfy this court on the relevancy of the evidence that Dr Mahathir could possibly offer to the purpose in calling Dr Mahathir to testify

Accordingly for the above reasons the subpoena served on Dr Mahathir is set aside and I rule that Dr Mahathir need not attend court to give evidence for the defence.